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## CURRENT EVENTS

### *Results of the Bankruptcy Investigation*

THE report on the bankruptcy investigation, conducted under the direction of the Solicitor General, was recently completed and submitted in a message by the President to the Senate and House of Representatives on Feb. 29, 1932. The report, with appendices, covers 211 pages. It begins with a statement as to the origin and reasons for the "Pending Inquiry." This is followed by Part II, entitled "The Failure of the Bankruptcy Act to Achieve Its Central Purposes," by Part III, devoted to "Defects in the Administrative Provisions of the Bankruptcy Act," and by Part IV, which deals with "Remedies."

The primary purpose of the law, the Report states, "was to insure the prompt and efficient realization and the pro-rata distribution, without preferences, of the assets of insolvent debtors." Unfortunately, "in practice we have found that debtors usually have such meager assets by the time they are brought into bankruptcy that it would make little difference whether these assets were paid preferentially to one creditor, or were distributed to all in fractional proportions, or, as is often the case, were consumed in fees and expenses of administration." As a consequence, "the bankruptcy court has increasingly become a dumping ground for the refuse of commercial wreckage, and a sanctuary where debtors obtain cancellation of their debts, regardless of how they may have wasted their property. As a medium of distribution the bankruptcy act has ceased to have any importance to the mercantile community except in a very small percentage of cases." Confirmation of the above statements is furnished by an analysis of the official reports, which follows.

Nor has the second main purpose of the bank-

ruptcy act, viz.: "to grant to honest but unfortunate debtors a discharge from their debts, and, as a corollary, to discourage commercial fraud and dishonesty by denying discharge in proper cases and by making certain acts punishable by imprisonment," been any more successfully achieved. "As shown by the discussion in the appendix," the report continues, "criminal punishments of bankrupts are so few in number as to raise serious doubt of the adequacy of the enforcement of the criminal provisions. These provisions are far more limited in scope than those of England, Canada, and other countries. They cover, in general, only concealments of property and perjury, whereas various unconscionable acts committed by debtors during insolvency are criminal offenses in other countries. It is believed, however, that until the existing laws are effectively enforced, nothing is to be gained by broadening their scope. Adequate enforcement will be quite impossible so long as bankrupts, except in rare cases, are able to obtain the benefits of the act without any adequate inquiry into their conduct. The same want of inquiry enables many compositions to be put through by bankrupts whose conduct, if made known, would not entitle them to the discharges which they thus obtain by the payment of a small percentage to creditors. The discharge provisions of the act may be made effective deterrents of commercial dishonesty and fraud if in every case the conduct of the bankrupt is subjected to searching public inquiry. The lack of such inquiry except in rare cases, as the law is now administered, facilitates practices the law was designed to prevent."

Certain figures are then given showing the ease with which discharges have been obtained and supporting the conclusion that "at no period of the law . . . does it appear that the discharge pro-

visions were effective . . . nor that the successive amendments substantially affected the situation." The facts, we are further told, "indicate that the fundamental weakness of the discharge provisions is in the theory underlying them. A discharge is a privilege, which should be granted only to those who, upon inquiry, are found deserving, but the statute, in effect, treats the discharge as a right, which should be denied only upon the proof of fraud by the creditors. The major consequences of this treatment are as follows:

"(1) The public interest involved is not recognized; (2) no one is under any duty to examine into the bankrupt's conduct and affairs; (3) no one is under any duty to oppose the bankrupt's discharge, however fraudulent his conduct has been; and when opposition does arise it is treated as a matter of private concern. The procedure is hedged with technicalities and the contest may be waged or withdrawn for purposes of private gain; (4) the courts have been shorn of all discretion, so that in the absence of opposition they must grant the discharge outright, even though the bankrupt be then in jail for fraudulent concealments; or if there is opposition they can not temper their action to fit the equities of each case and the circumstances of each bankrupt."

These various consequences are then examined more in detail, after which a number of "typical cases illustrating the weaknesses of the discharge provisions" are presented. These cases demonstrate that "bankrupts may be divided into four major classes: (1) The strictly fraudulent, whose discharges should be denied. (2) The honest, but unfortunate, overwhelmed with debt, who should receive a full discharge on grounds of public policy. (3) The honest but temporarily embarrassed, harassed by garnishments or attachments, who could pay if given time under the protection of the court. —The effect of lumping them with the second class and discharging them automatically is to destroy their sense of moral obligation and to promote extravagance and shiftlessness. (4) The large borderline class who are neither strictly honest nor strictly fraudulent, but whose conduct is not such as to justify a full discharge.—These are the bankrupts who have recklessly lived beyond their means; gambled away their money or grossly neglected their affairs; incurred judgments for negligence or for culpable conduct of different sorts; obtained credit in immediate contemplation of bankruptcy or without the slightest regard as to when or how it might be paid; engaged in illegal occupations, and so on. Included also are those bankrupts who have resorted to the law not under pressure of overwhelming debts or of attachments or garnishments, but evidently with the purpose of avoiding their just obligations; men whose exemptions are more than enough to pay their debts without sacrifice or who have purchased exempt property with their creditors' money; men with high earning capacities or trifling debts or both; men seeking bankruptcy to keep their creditors from sharing in an expected inheritance or in some profitable contract presently to be executed, and so on."

The report draws two conclusions from the facts: "First, that unless provision is made for inquiry into the conduct of every bankrupt and for presenting the facts impartially to the court, such

inquiry will never be made except in a handful of cases where some pecuniary gain may be expected to result, and in all other cases the bankrupt will have his discharge for the asking and without inquiry or disclosure. Secondly, that unless the courts are given power to discriminate between the different classes of bankrupts described above, and to grant full relief or partial and temporary relief or no relief at all, according to the facts presented, vast numbers of people for whom the law was never designed will continue to pervert its objects without the slightest hindrance, all to their own demoralization and the injury of the public interest."

In the following division of the work the "Referees" and "trustees" are considered. Under the present system "the importance of the referee in bankruptcy administration cannot be exaggerated. The duties now placed upon him require of him not merely judicial qualifications but business judgment, knowledge of merchandise, and executive capacity. These combined qualifications cannot always be found, and . . . there are other objections to the mingling of judicial and business functions. The subject is further considered under the heads of "meager compensation and lack of incentive," "lack of uniformity and coordination," and "abuse of expense accounts and overcharges on commissions." Speaking of "The Fee Basis of Compensation," the report says, in part:

"Thus the referees' compensation is affected by the amount of business brought into bankruptcy. If a referee is too strict in his allowances of attorneys' fees, the attorneys may try to keep the cases out of bankruptcy and settle them through common-law assignments or other similar means. If the referee is very lenient in his treatment of bankrupts, particularly of the wage-earning class, not requiring them to attend the first meeting or to be examined except upon application, and assisting them with the preparation of their petitions and schedules, more cases may come in than would otherwise come in. In cases in which dividends are to be paid every allowance that the referee makes and all rulings on reclamation petitions and other matters affecting the amount of the assets of the estate, directly affect his compensation. An acute example is in turnover proceedings in which the referee may order the bankrupt, on pain of being cited for contempt, to turn over to the estate property which he is alleged to have concealed and out of which commissions may be realized.

"Conclusion may not be warranted that any of the referees have been consciously influenced by such considerations in the performance of judicial or administrative duties. Many lawyers and others concerned in proceedings before them have, however, emphatically expressed criticism of the statute upon such grounds, and such criticism appears to us quite unanswerable. (See *Tumey v. Ohio* (1926), 273 U. S. 510.)"

Dealing with "Trustees and Their Selection," the report presents certain statistics which show, that "with negligible exceptions, trustees in bankruptcy are not appointed by the creditors directly, but are appointed either by the courts or by proxy holders." The results of these two methods of appointment are then set forth, leading to the conclusion that "the administration of bankrupt estates, and particularly of the great mass of small estates,

will never be placed on a permanently businesslike and efficient basis unless: (1) Trusteeships are restricted to thoroughly experienced and reputable persons whose qualifications have been established by impartial inquiry; (2) The compensation of trustees is sufficiently increased to attract trustees of such a character into the liquidation field; and (3) The legal formalities are, as far as possible, eliminated and business responsibility placed squarely upon the trustees."

Part IV, which deals with "Remedies," is as follows:

"The law does not attain its objectives. It encourages and facilitates fraud on the part of insolvent debtors. It permits the exploitation of its own process. Its administration is expensive, slow-moving, and unsatisfactory to the business community. It has demoralized the integrity of large numbers of people who have been discharged from debts which they might have paid without hardship had the law discriminated between those who, through misfortune, are overwhelmed with debts and those needing only temporary relief and an opportunity to deal fairly with their creditors. Many will say of such a law: It is bad. Repeal it. This simple formula overlooks the responsibility of government upon which all laws are predicated. Bad as conditions are under the present law, it is entirely clear that the business life of the community requires a uniform system for the realization and liquidation of estates in bankruptcy. It requires a better law. The task is to provide the remedy by amendment, not repeal.

"We have seen that the act has failed to achieve its primary purpose of providing a medium for the ratable distribution of the assets of insolvent debtors because ordinarily these assets are largely consumed or dissipated before the estate is brought into bankruptcy. Instead of affording relief to debtors before their affairs have been completely ruined in financial failure, the act insists upon liquidation or a cumbersome process of composition and no practical method is provided for saving debtors from ruin without branding them as bankrupts.

"We have concluded, therefore, that the act should be amended so as to provide remedial process in voluntary proceedings under which debtors, unable to pay their debts in due course, may have the protection of the court, without being adjudged bankrupt, for the purpose of composing or extending the maturity of their debts, amortizing the payment of their debts out of future earnings, procuring the liquidation of their property under voluntary assignments to a trustee, and in the case of corporations for the purpose of reorganization.

"We have also seen the failure of the second main purpose of the act, to grant discharges with some discrimination and to discourage fraud and dishonesty by the exercise of such discrimination. Discharges are shown to be customarily granted without consideration or knowledge of the facts and in most cases without any inquiry regarding the conduct of the bankrupt. The demoralizing effect of all this, not only upon trade but upon standards of business honesty and integrity, is only too obvious.

"We have concluded, therefore, that the act should be amended so as to require the examination by a responsible official of every bankrupt and a full

presentation of the facts bearing upon the cause of his failure and his conduct in connection therewith for the consideration of the court in determining whether he should have his discharge. The discretion of the courts in granting or refusing a discharge should be broadened; in proper cases discharges should be suspended for a time and the bankrupt in such cases should be required to make some satisfaction out of his after-acquired property as a condition to the grant of a full discharge. Public interest is so directly affected by the indiscriminate grant of discharges without inquiry and disclosure of the facts that the responsibility for such inquiry and disclosure should be imposed upon responsible officials.

"Experience under the laws of this country, and of Canada and England, shows that creditors may not be relied upon to examine the debtor and oppose his discharge. In this connection, it is encouraging to note that the imposition of responsibility for the performance of these functions upon competent officials by the English Act of 1883 accomplished the effective reform of evils precisely similar to those which are disclosed by our investigation. These functions we believe will be most effectively and impartially performed by examiners who have no other responsibility in connection with the administration of the estate.

"We have seen the faulty administration of estates, largely due to the frequent selection of an inefficient and untrained liquidating personnel, and to the complete confusion of administrative and judicial functions, which has burdened the purely business task of realization and liquidation with unnecessary legal expense. All this has brought the law into disrespect, has deterred business men of training and experience from participating in its administration, and has very largely turned the administration of business matters over to lawyers who, frequently underpaid for important legal services in bankruptcy, necessarily seek to charge for the time spent in routine and business details as for professional services.

"We have concluded, therefore, that the compensation of trustees should be put upon a basis which will attract the services of a trained business personnel with sufficient organization to conduct the business of realization, liquidation, and distribution promptly and efficiently and to the satisfaction of the creditors. The choice of the trustee should be limited to competent individuals or organizations who have been previously qualified by order of the court after careful inquiry as to their qualifications.

"We have seen the lack of uniformity in practice under the act and of any coordination of effort to improve the methods of administration. We believe that the improvement and perfection of the law will depend upon constant consideration of problems which arise in its administration. It will not suffice merely to amend the law. Continuous vigilance in its administration is requisite to permanent improvement and we therefore believe that competent officials should be charged with the observance of its workings and the duty to suggest to the courts and to Congress methods for the improvement of its administration.

"The amendments proposed to carry out these major changes, together with amendments designed

in general to promote greater expedition, simplicity and economy in administration, and more effective realization of assets, including provisions for compensating referees on a salary basis, enlarging their powers, jurisdiction, and districts, and gradually reducing, so far as practicable, the number of those who are on part time, and other amendments deemed desirable, are embodied in a draft of a proposed bill for the amendment of the law, which is submitted herewith. The proposed amendments are analyzed and discussed in an analysis of the proposed bill, at pp. 68 to 136. The most important amendments are quoted textually from the proposed bill.

"It is believed that the principles outlined above, upon which the revision of the law should be based, are sound and thoroughly justified by the facts ascertained during the inquiry. The specific amendments designed to carry these principles into effect have been long considered and quite thoroughly discussed with various representative committees and individuals. Further discussion, however, will be invited and may lead to desirable changes in form.

"In connection with the proposal that official responsibility be assumed for the examination of every bankrupt and for continuous consideration of the problems of administration we have studied the cost of such a system and find that a nominal charge against the estates will afford revenues quite sufficient to fully cover the cost to the Government of maintaining the system. The costs and receipts are analyzed in the appendix, p. 137.

"Respectfully submitted.

THOMAS D. THACHER,  
*Solicitor General.*

LLOYD K. GARRISON,

*Special Assistant to the Attorney General."*

An Appendix of 268 pages deals with the scope of the inquiry and sources of the report, the steps taken in formulating the proposed amendments, the History of the Bankruptcy Act and Comparative Legislation, an analysis of the proposed Bill to amend the Bankruptcy Act and other pertinent material. The message and report are printed as Senate Document No. 65 and can doubtless be secured from the Government Printing Office at Washington, D. C.

#### *Massachusetts and the "Lame Duck" Amendment*

THE Massachusetts Legislature has seized the opportunity afforded by the submission of the proposed constitutional amendment fixing the commencement of the terms of President, Vice-President and members of Congress, and fixing the time of the assembling of Congress, to reaffirm emphatically the State's policy as declared in the Act of 1920. The preamble to that measure says that "It is hereby declared to be the policy of the commonwealth that the General Court, when called upon to act upon a proposed amendment to the Federal Constitution, should defer action until the opinion of the voters of the commonwealth has been taken, as herein provided, relative to the wisdom and expediency of ratifying the same."

The Committee on Constitutional Law of the Massachusetts Senate, to which was referred the

message of the Governor transmitting, in accordance with the request of the Department of State, a certified copy of the Resolution of Congress, reported on March 22 that in its opinion the proposed amendment was meritorious but recommended, in view of the policy as above declared, "that the vote on ratification of the proposed Amendment be not taken at the present session of the general court, but that it be referred to the next annual session in order that the opinion of the people as to the wisdom of ratifying said amendment may be obtained by submission of the question to the voters at the biennial State election in the current year . . ." The committee's report was adopted on the following day.

Commenting on the State's declared policy, previously to the action of the Senate, Mr. Frank W. Grinnell of Boston, in a letter published in the Springfield Republican of March 15 said: "No matter what the subject matter of any proposed amendment may be, the ratification of an amendment to the Constitution of the United States is, and should be, considered by the legislatures and the public as a solemn matter deserving careful study and deliberate judgment. The purpose of submitting such amendments to the various states is to secure such deliberate study and judgment after the amendment is submitted, in order that the people of the United States, whose constitution is involved, should have an opportunity to study and consider the matter and inform their representatives in their legislatures of their opinions if they wish to do so.

"While some persons in each state follow the proceedings of Congress, many others do not follow them sufficiently to understand clearly the contents and effect of such an amendment until after it is submitted to the States. Such persons, who may have as intelligent an interest in their government as any one else, are entitled to ample opportunity to study the proposal thus submitted."

#### *Second Annual Report of Michigan Judicial Council*

THE Judicial Council of Michigan, according to its second report, dated February, 1932, has devoted its attention during the past year to "four subjects of importance in the administration of Justice, namely Judicial Statistics, Procedure for Discovery before Trial, Condemnation Procedure and methods for the relief of the Supreme Court. It has not undertaken to propose to the Supreme Court any specific changes in the Court Rules, for the reason that the Court itself has been actively engaged in studying the effect of the new rules and in preparing such amendments as seemed to it desirable."

The report states that the Council had concluded, "as a result of its experience in 1930, that there was a definite limit beyond which it was impracticable to go in requiring statistical data from officers of the courts, in view of present methods of keeping court records, and that if further information were wanted, it should be obtained by special investigators employed for that purpose. Accordingly, the forms for the 1931 reports were simplified, and the amount of information called for was limited to facts bearing upon the load of litigation in various classes of cases, the number of judges sitting, the aggregate number of days of holding court

for all of the sitting judges, and the number of days the jury was in session." These statistics, however, have been supplemented by a special investigation carried out in a number of typical counties, by which information was obtained regarding the economic importance of the litigation going on in the circuit courts, the extent of the use of juries in civil actions at law, and the comparative results obtained in trials by judges and trials by jury in different classes of cases.

Under the head of "Character of Parties as Affecting Method and Result of Trial" statistics are presented from a group of counties ranging from Wayne, with its metropolitan district and a population of 1,888,946, to small and predominantly rural counties, like Barry and Lapeer. "It has been supposed," says the report, "that juries were more frequently demanded by individual parties when opposed to corporations and that the jury was more likely than the judge to favor the individual litigant." The figures from Wayne County from Jan. 1 to June 30, 1931 inc., show, curiously enough, that, in contract cases at least, where there was a corporation plaintiff against an individual defendant, an individual plaintiff against a corporation defendant, and a corporation plaintiff against a corporation defendant, the percentage of jury and non-jury trials was exactly the same—18 to 82. Where the plaintiffs and defendants were both individuals the percentage of jury trials was somewhat higher—24 to 76 non-jury trials. Moreover, in the jury trials the corporation plaintiffs secured more verdicts than the individual plaintiffs (64 to 43), while in the non-jury trials of contract cases the individual plaintiffs had the better of it (77 recoveries as against 73 by corporation plaintiffs).

When we come to tort cases, however, the preference of the individual plaintiffs of Wayne county for juries is more marked. The percentage of jury trials where there was a corporation plaintiff against an individual defendant was 22, while the percentage in the case of individual plaintiffs against corporation defendants was 47. In the jury trial tort cases the corporation plaintiffs secured recoveries in 50 percent, while the individual plaintiffs prevailed in 62 percent. In the non-jury trial cases the corporation plaintiffs were successful in 84 percent, while the individual plaintiffs gained 54 percent. Where there were individuals on both sides, 35 percent were tried by jury, and the plaintiffs prevailed in 64 percent of the jury trials and in 64 percent of non-jury trials.

When we come to the predominantly rural counties the preference for jury trial is marked in both contract and tort cases. For instance in tort cases in the Lapeer County Circuit Court (Dec. 1923 to March, 1931) there were 50 percent of jury trials where an individual plaintiff against a corporate defendant was involved and the plaintiff recovered in all trials, both jury and non-jury. In cases where there were individuals on both sides, there were 95 percent of jury trials, in 28 percent of which the plaintiff recovered, and 5 percent of non-jury trials in all of which the plaintiff recovered. The figures given here are of course brief and fragmentary and are merely intended to suggest the interesting character of the statistics which fill many pages of this report of the Judicial Council.

About one-half of the 177 pages of the report

is devoted to an appendix containing a study of "Procedure for Discovery before Trial," by George Ragland, Jr., A. B. (Ky.), S. J. D. (Mich.), Research Assistant in the Legal Research Institute of the University of Michigan Law School. The report says this of the study in question:

"The manifest advantages which would accrue in the administration of justice from the use of an effective discovery before trial, would undoubtedly have produced a more extensive development of discovery procedure were it not for the widespread fear in the profession that its use would stimulate perjury and the production of fictitious evidence. But in spite of this feeling the use of discovery has made extraordinary progress in the last thirty years both in England and the British dominions and in the United States.

"Experience is the best test of the usefulness of any procedural device, and in order to appraise the actual experience of the profession with discovery procedure, a field study was undertaken by the Legal Research Institute of the University of Michigan. Mr. George Ragland, Jr., assistant professor of law in the University of Kentucky, who had already done a large amount of work on this subject while a graduate student in the Law School of the University of Michigan, was employed to make the study. He devoted the entire year 1930-31 to the work. His plan was to take up in turn each jurisdiction which had made important progress in the development of discovery before trial, and as to each one, first make a thorough study of its statutes, practice books and decisions and then investigate its discovery practice on the ground, through conferences with lawyers and judges, examination of court records and attending discovery examinations. This method of study was carried out in New Hampshire, Massachusetts, New York, New Jersey, Ontario, Quebec, Ohio, Indiana, Kentucky, Wisconsin, Kansas, Nebraska, Missouri, and Texas. The practice in many other states was studied by means of an extensive correspondence with lawyers and judges residing there.

"The results of this study of professional experience with discovery procedure throughout the United States and Canada are presented in a somewhat condensed form as an appendix to the present Report of the Judicial Council. This appendix, on Procedure for Discovery before Trial, is commended to the bar of Michigan. It has been prepared and published for the information of the profession, with the expectation that it would help to stimulate an active interest in discovery practice and that it might result in the formulation and adoption of a more effective method of discovery than we now have in this state. This might be done either by making specific provision for discovery or by removing some of the restrictions now attaching to the taking and using of depositions."

The report announces that the Judicial Council proposes, in collaboration with the State Bar Association, other interested organizations, and State officers to prepare a bill for presentation to the next regular session of the State Legislature, embodying the best modern doctrines regarding methods for condemnation of land. In this connection it calls attention to the exhaustive study of the subject made by Prof. Roy R. Ray, of the Law School of the Southern Methodist University of Dallas,

Texas, and published as in appendix to its first report. It also states that the Lawyers Club of the University of Michigan has made an appropriation of funds to enable the Council to make a thorough study of the experience of other States in dealing with the problem of relief for the Supreme Court. The work will be done under the direction by Prof. Edson R. Sunderland, Secretary of the Judicial Council. The need for it is sufficiently shown in the Council's statement that "the amount of litigation coming into that court is so large that ways and means for relieving the excessive burden resting upon the present Justices has become a major problem of judicial administration in Michigan."

### *Meeting of American Law Institute*

THE American Law Institute will hold its tenth annual meeting at Washington, D. C., on May 5, 6 and 7, 1932. It will consider the following drafts of restatements which were considered by the Council at meetings held in December, 1931, and February, 1932, and have been submitted by it to the members for discussion at this meeting: Agency Tentative Draft No. 7; Business Associations Tentative Draft No. 3; Conflict of Laws Proposed Final Draft No. 3 (A revision of the Chapter on Wrongs); Conflict of Laws Proposed Final Draft No. 4 (Chapter on the Administration of Estates); Contracts Tentative Draft No. 11; Contracts Tentative Draft No. 12; Contracts Tentative Draft No. 13 (Proposed Changes in Certain Sections of the earlier Drafts); Torts Tentative Draft No. 8; Torts Tentative Draft No. 9; Trusts Tentative Draft No. 3; Administration of Criminal Law Tentative Draft No. 2 (A Proposed Act on Double Jeopardy).

All sessions will be held in the Ball Room of the Mayflower Hotel. Following is the program of the meeting:

#### Wednesday, May 4

10:00 a.m. Registration of members and guests in the Pan-American Room, Mayflower Hotel, until 10:00 p.m.  
9:30 p.m. Informal reception by the Council to the members and guests, and the ladies accompanying them, in the Ball Room of the Mayflower.

#### Thursday, May 5

9:30 a.m. Registration and assembling of members and guests.  
10:00 a.m. 1. Address by the President, George W. Wickersham.  
2. Informal remarks by the Chief Justice of the United States.  
3. Report of the Treasurer, George Welwood Murray.  
4. Report of the Director, William Draper Lewis.\*  
5. Report of Herbert F. Goodrich, Adviser on Professional and Public Relations.\*  
6. Report of the Committee on Membership, to be presented by the Chairman, George E. Alter.  
7. Election of Council Members. The terms of the following members of the Council expire at this meeting: Benjamin N. Cardozo, Frederick F. Faville, William I. Grubb, William Brown Hale, Learned Hand, Orrin K. McMurray, Emmett N. Parker, William D. Mitchell, Edgar Bronson Tolman, George W. Wheeler, George W. Wickersham.  
8. New business.  
11:30 a.m. Consideration of Conflict of Laws Proposed Final Draft No. 4.  
1:00 p.m. Adjournment for luncheon.  
2:15 p.m. Continuation of the discussion of Conflict of Laws Proposed Final Draft No. 4.

\*Opportunity will be given for questions from the floor.

3:00 p.m. Consideration of Administration of Criminal Law Tentative Draft No. 2.  
5:00 p.m. Adjournment.

#### Friday, May 6

10:00 a.m. Consideration of Contracts Tentative Drafts Nos. 11 and 12, and Draft No. 13.  
12:00 m. Consideration of Business Associations Tentative Draft No. 3.  
1:00 p.m. Adjournment for luncheon.  
2:15 p.m. Continuation of the discussion of Business Associations Tentative Draft No. 3.  
3:30 p.m. Consideration of Conflict of Laws Proposed Final Draft No. 3.  
5:00 p.m. Adjournment.  
5:00 p.m. Reception and tea in the Chinese Room of the Mayflower Hotel to members, guests, and ladies accompanying them.

#### Saturday, May 7

10:00 a.m. Consideration of Torts Tentative Draft No. 8.  
12:00 m. Consideration of Torts Tentative Draft No. 9.  
1:00 p.m. Adjournment for luncheon.  
2:15 p.m. Consideration of Trusts Tentative Draft No. 3.  
3:30 p.m. Consideration of Agency Tentative Draft No. 7.  
5:00 p.m. Adjournment.  
7:30 p.m. Dinner in the Ball Room of the Mayflower. George W. Wickersham, President of the American Law Institute, will preside. The speakers at the dinner will be announced later.

### *Methods of Selecting Judges*

THE Committee on the Judiciary of the Association of the Bar of the City of New York has presented a special report on "Methods of Selecting Judges." The report takes up various plans which have been tried in New York, or suggested for trial, after which it considers the activities of Bar Associations in this connection.

"Efforts have been made in several of the large cities to influence the election of desirable men as judges by the action of the bar associations of those cities," it says. "Some of the cities have worked out very elaborate plans for bar primaries, by which a vote is taken by the members of the Association as to desirable candidates, and the men chosen in such primaries are urged upon the various organizations for nomination by them. In some cities where such organizations have not accepted the names of those successful in the bar primaries, the bar associations have independently nominated them and conducted a campaign for their election. Your Committee has endeavored to obtain information in regard to these efforts and has had considerable correspondence with members of the bar in several of the cities. It has not, however, been satisfied that the results have been generally successful. It is claimed that they have been successful at times in Chicago, in Cleveland, and in Los Angeles, but your Committee is inclined to think that those successes have occurred at times when there was a general overturn of the party in power, or when the nominations of the bar associations were adopted by a citizens' movement based largely on other issues than the judiciary, which movement happened to be successful.

"In all those cities there has not been such an overwhelming voting superiority of one party over the other as we find in New York City. Where the electorate is more or less evenly divided in general elections it is easier to obtain a successful result in the selection of judicial officers than in cities where one party or the other has an overwhelming superiority in votes. In addition to this, the expense of conducting bar primaries, and especially

an independent campaign for bar candidates, is very large and involves a very large amount of work. In our opinion it is doubtful whether any bar association can continue to conduct such primaries and campaigns year after year, although it may do so on special occasions. . . ."

"On the whole," the report concludes, "your Committee is not prepared to approve of any of the plans above mentioned, other than appointment by the Governor, with the advice and consent of the Senate. As already stated, that plan fixes the responsibility upon the Governor. Experience has shown that that plan works well in the federal government and in other states where it is still followed, such as Massachusetts. Where responsibility for action is fixed upon an individual, he is generally inclined to give careful consideration to his action and to the advice of persons competent to give it. Desirable men would often accept appointment who would decline to enter a political campaign for election. This Association has already gone on record as favoring appointment by the Governor, rather than popular election. If it be argued that there is little prospect that the Legislature and electorate will approve the necessary amendment of the Constitution, we can only say that in our opinion it is the duty of this Association and of the bar to advocate and fight for what it deems to be best, even though the fight be hard and the issue uncertain."

The report is dated Feb. 1, 1932, and is signed by Samuel H. Ordway, Chairman, and Chase Melten, Secretary.

### *Yale Library Gets Rare Law Book*

**A**N original edition of Statham's Abridgment, believed by many to be the first printed English law book, has been presented to the Yale Law School Library by an alumnus of the school who prefers to remain anonymous, according to an announcement by Professor Frederick C. Hicks, Law Librarian. This edition, which is undated, but supposed to have been published in 1490, is one of the twenty-two recorded copies of the book, thirteen of which are in the United States and nine in England. All but two are in libraries.

"The book has been the subject of much study by legal scholars because it is not only the first printed digest of English case law found in the Year Books, but also summarizes cases not yet discovered in any Year Book manuscript," said Professor Hicks. "It is the first ancestor of the great digests of Anglo-American law which today have developed into the American Digest System. To bibliographers it is of special interest because it may be the first printed English law book. Only two other books contend with it for that place. Experts conclude that it was printed by Le Talleur of Rouen, France, for Pynson, a London printer. Le Talleur's printer's device is on the last page, and the table of contents ends with the words, 'Per me R. pynson.' The type is an imitation of the handwriting of the time."

## Arrangements for the Fifty-Fifth Annual Meeting

Washington, D. C., October 10-15, 1932

Section Meetings, Monday and Tuesday, October 10 and 11.

General Sessions, Wednesday, Thursday and Friday, October 12, 13, 14, 1932.

Annual Dinner Saturday evening, October 15.

HEADQUARTERS: Hotel Mayflower, Connecticut Avenue.

Hotel accommodations are available as follows:

	Single (For 1 Person)	Double (For 2 Persons)	Twin Beds (For 2 Persons)	Parlor Suites
Carlton ....	\$5-6-7	\$8	\$9-10	\$15-20-25
Hay-Adams \$4		\$6-8	\$10	\$12 and up
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# THE SOLICITOR GENERAL'S BANKRUPTCY REPORT AND NEW BANKRUPTCY BILL

Condemnation of the Present Law in the Report Is Founded, in the Main, on the Large Liabilities, the Meager Assets and the Small Dividends—These Are Admitted Evils but It Does Not Follow That They Are the Results of a Defective Bankruptcy Law—Expenses of Administration—Plan for Voluntary Assignments for Benefit of Creditors—Compensation of Referees—The Discharge Phase of Bankruptcy Administration, etc.

BY WALTER D. COLES  
*Member of the St. Louis Bar*

IN July, 1930, the President of the United States announced that he had "authorized the Attorney General to undertake an exhaustive investigation into the whole question of bankruptcy law and practice." That the work would be "under the direction of the Solicitor General" who would "be assisted by the Department of Commerce." On December 8, 1931 the Attorney General submitted to the President the report of the Solicitor General which describes the scope and nature of the inquiry, the defects which he found in the law and its administration and the amendments to the law which he believed to be necessary. At the same time the Attorney General submitted to the President the draft of a bill prepared by the Solicitor General "setting forth the proposed amendments."

## I.

It is no disparagement of the Solicitor General's bankruptcy investigation to say that he has developed few new facts or tendencies. All recent studies of bankruptcy systems have disclosed the same fundamental facts and conditions. The aggregate debts of bankrupts are very large. The assets relatively small. The dividends paid creditors but a small percentage of their claims. These are recognized evils which have been found to be the concomitants of all insolvency and bankruptcy systems. The legislative cure of these evils is an age old problem which has baffled the efforts of generations of earnest and well informed reformers. This particular field of legislation has been so intensively cultivated that it is very difficult to suggest any new expedients, giving reasonable promise of improvement, which have not been given practical application somewhere. The Solicitor General suggests few new remedies, and in the main, what is new to us in his proposed legislation is taken textually or substantially, from the existing English bankruptcy statutes. The Solicitor General finds that our present bankruptcy law is a "failure" does not "attain its objectives," and requires general and radical revision. His condemnation of the law is founded, in the main, upon the existence of the evils already mentioned, that is to say, the large liabilities, the meager assets, and the small dividends. All these evils seem to be treated as essentially the results of a defective bankruptcy system.

## II.

No doubt the evils of which the Solicitor General complains are registered in bankruptcy statistics, but it does not follow that they are the results of a defective bankruptcy law. Speaking generally, it may be said that insolvency and failure result from social and economic causes which in the main are entirely disassociated from the existence of a bankruptcy law. In one aspect, the bankruptcy courts may be regarded as a sort of national clearing-house where the business mistakes, misadventures, misfortunes and failures of the people are registered and summed up. In a country like ours the monetary loss registered is very large at all times. In the more recent years the conventional practices and activities of our people have tended greatly to increase the total of monetary loss. This total of loss reflects not only such losses as result from ordinary business failure, but also those which result from speculation and shrinkage in land, security, and commodity values. Another factor has entered to further increase the loss. A new idea has been proclaimed and accepted by many as a distinctive principle of American life. Everyone is entitled to enjoy all the good things of this world. The man or woman of small income and slender resources is entitled to the same comforts, luxuries and pleasures as the well-to-do or the rich. This idea has been made plausible by the development of instalment selling which enables anybody to buy anything upon making a small initial payment. In this field intensive selling and high powered salesmanship have committed the people to an enormous burden of debt. Most of these debtors are honest optimists, who at the outset expect to pay their debts. These are the principal factors which have operated to build up the mountainous total of "liabilities," which the Solicitor General lays at the door of our bankruptcy system.

## III.

The Solicitor General's report shows that in the great majority of bankruptcy cases the bankrupt has no assets in excess of his exemptions, and that in the remaining cases the assets which can be administered are small in relation to the bankrupt's liabilities. He adds that the assets administered are so "meager" that it "would make little difference whether these assets were paid preferentially

to one creditor or were distributed to all in fractional proportions or were consumed in expenses of administration." Undoubtedly, the assets brought into the bankruptcy courts are "meager" in proportion to the aggregate of liabilities, but to say that they are negligible seems a stronger statement than the facts warrant. It is shown in the Donovan Report that the gross assets realized in the administration of bankrupt estates considerably exceed the total of all judgments awarded in civil cases in all United States District Courts.<sup>1</sup> The average amount paid to creditors from estates administered in bankruptcy for the fiscal years 1929, 1930 and 1931 exceeded seventy-one million dollars per annum. It seems a reasonable assumption that the creditors would rather have received this sum than nothing. It may be that the paucity of the bankrupt's assets at the time of his bankruptcy is, to some extent, a result of the existence and operation of the bankruptcy law, but it is certain that the bankruptcy law is a minor factor in producing this result. The meagerness of the debtor's assets at the time of his failure generally results from the perennial and ineradicable traits of human nature. The embarrassed or failing debtor almost invariably hopes against hope and in an endeavor to retrieve his fortunes struggles on until his credit is exhausted and his property almost entirely dissipated. The writer has examined hundreds of bankrupts who owed very large debts and who had very little property left at the time of their bankruptcy, but who nevertheless insisted that if their creditors had given them "more time" they would have "paid out."

The Solicitor General thinks that the paucity of the bankrupt's assets at the time of bankruptcy is materially influenced by another cause. In his report he says: "A cause which magnifies the losses is the reluctance of the debtors to seek bankruptcy until all their assets are gone. This reluctance is due to the desire of the average debtor to avoid the stigma of bankruptcy." The writer has been in daily contact with bankrupts and prospective bankrupts for more than thirty years, but few facts have come to his notice tending to confirm this view. The Solicitor General is convinced that if you can relieve the embarrassed debtor of the "stigma of bankruptcy" that he will be disposed to come into the bankruptcy court earlier and with more assets in hand and he seeks to translate this idea into law. He proposes to change the existing statutory definition of "bankrupt" so that a person can go through all the processes of bankruptcy under the statutory designation "debtor." Under the proposed amendment the newly named "debtor" is, or may be, in precisely the same plight, subject to the same penalties, and entitled to the same privileges as the present "bankrupt." The "debtor" may secure a discharge in bankruptcy without paying anything to his creditors or he may discharge his debts by composition at twenty cents on the dollar. If there is any "stigma" attaching to "bankruptcy" it might be supposed that it results from the fact that the debtor has failed financially, is unable to meet his obligations and is in a court of bankruptcy because of these circumstances. If it is discreditable or humiliating to go through bankruptcy as a "bankrupt" it is difficult to see how it

could be any less so to undergo the same experience as a "debtor." The distinction seems formal and technical, and it may be rather confidently predicted that this particular change would have very little tendency to induce embarrassed debtors to come into the bankruptcy court at an earlier stage of their financial decline.

#### IV.

The Solicitor General complains that the expenses of administration under the existing bankruptcy statutes are high. The writer is of opinion that on the whole they are too high and could be materially reduced by a few changes in the law which would insure the appointment of more competent and experienced trustees and "speed up" the processes of liquidation. The writer in another place has set forth his views as to the changes in the law which he believes would tend to promote these ends.<sup>2</sup>

It admits of no question that the amendments proposed by the Solicitor General if enacted would enormously increase the expenses of administering bankrupt estates. The Solicitor General seeks to engraft upon our law many of the features of the English law and to make our law as much like the English law as he thinks practicable. But the average expenses of administration under the English law are nearly twice as great as they are under our existing law.<sup>3</sup> Furthermore, the bill proposed by the Solicitor General will not only greatly increase the compensation of most of the present officers who are concerned in the administration of the bankrupt law, but will create a horde of new officers whose compensation will be a charge upon bankrupt estates.<sup>4</sup> The proposed amendments provide for a minimum fee of \$100.00 to the trustee and it is obvious that in very small estates there will be no possibility of salvaging anything for any class of creditors. In only about five per cent of the cases do the assets available for distribution to creditors exceed five thousand dollars. Assuming that the estate exceeds \$5,000.00 and that it is administered in the normal way by a trustee in bankruptcy the proposed increase in the fees of "bankruptcy officials" may be tabulated (approximately) as follows:

2. "Donovan Report on Bankruptcy Law and Administration," American Bar Journal, July, 1930, p. 431.

3. There is appended to the Donovan Report an article upon "Bankruptcy Administration in England," prepared by David Teitelbaum "under the guidance of the Honorable Thomas D. Thacher." In this article Mr. Teitelbaum says that in England the average percentage of costs of administration to total gross assets realized for the year 1928 was 51.1 per cent; for the year 1927, 35.7 per cent, and for the year 1926, 42.4 per cent. Donovan Report (The Court Press, N. Y.), p. 304. Upon consulting the Bankruptcy Reports made by the "Board of Trade" in London for the years in question the writer finds that Mr. Teitelbaum's statistics are substantially correct. A slight adjustment of the above statistics must be made to render them strictly comparable with U. S. bankruptcy statistics. In England the amount paid secured creditors (which is relatively small) is deducted from "gross receipts" in order to ascertain "gross assets." This procedure tends to make the costs of administration appear higher in England than they would be if the method employed in the U. S. statistics were employed. From the statistics contained in the Annual Reports of the Attorney General of the United States for the years 1928, 1927 and 1926 the average percentage of costs of administration to total gross assets realized for those years can be computed under the United States Bankruptcy Law. The results are as follows (approximately): 1928, 23.75 per cent; 1927, 22.15 per cent; 1926, 21.5 per cent.

4. As interpreted by the Solicitor General his proposed bill is expected to authorize the appointment of the following additional bankruptcy officials and employees: 10 Administrators; 40 Assistant Administrators; 30 Clerical Workers; 200 Examiners; and 100 Stenographers. The total expense incident to the maintenance of these officials and employees as estimated by the Solicitor General will be \$1,335,000.00 annually. See "Report of the Attorney General on Bankruptcy Law and Practice," p. 137. (Senate Document No. 65—72d Congress 1st Session.)

1. Donovan Report (printed by The Court Press, N. Y.). p. 352.

Net Amount for Distribution	Amount of official fees under existing statute	Amount of official fees under proposed statute
\$ 5,000.00	\$ 210.00	\$ 510.00
10,000.00	360.00	960.00
100,000.00	2,240.00	4,760.00
1,000,000.00	21,140.00	35,760.00

If there is any merit in the proposed new bankruptcy legislation it is certainly not to be found in those features of the bill which have to do with expenses of administration.

## V.

There are two general phases of bankruptcy administration. One relates to the realization, liquidation and distribution of the bankrupt's estate. The other to the discharge of the bankrupt from his dischargeable debts. For convenience we may refer to the first as the liquidating phase and to the second as the discharge phase. As to the liquidating phase it is believed that the present law is operating reasonably well in those jurisdictions where it is being efficiently administered. Much is said about the merits of the English bankruptcy system, but it is reasonably clear that as regards the liquidating phase of bankruptcy administration we can effect no improvement in our law by adopting the expedients of the English law. There can be no doubt that the expenses of administering the bankrupt's assets brought into the bankruptcy court are, on the average, lower under our law than under the English law and that the distribution to creditors is made more promptly here. In view of these facts it is strange that the Solicitor General's scheme of reform, in so far as it relates to the liquidation of bankrupt estates, involves, in the main, the abandonment of our methods of administration and the adoption of English methods.

## VI.

Under our existing law the administration of the bankrupt estate is normally conducted by a trustee in bankruptcy acting under the control and supervision of the "court of bankruptcy." Under the Solicitor General's plan this is to be changed so that judicial control and supervision will be largely eliminated and the liquidation and distribution of the estate will be under the control of the trustee "subject to any directions of the creditors at a meeting or their committee." As no meeting of creditors will normally be held for the purpose of giving "directions" to the trustee it may be assumed that in practice the trustee will conduct the liquidation without other control than such "directions" as may be given by the "creditors committee." No recourse can be had to the court save in instances where "there is a difference of opinion between the trustee and the creditors or between the trustee and the committee, or in the absence of a committee between the trustee and any creditor." The practices and tendencies which prevail in the field of bankruptcy administration are so well known that we need not resort to mere prophecy in order to foretell with reasonable certainty how the Solicitor General's plan would work in practice, should it be put in force. Save possibly in very large estates, few creditors will concern themselves in any way with any phase of the administration of the estate. The trustee will generally be appointed by "proxy holders" who in the main will be collection agents who have secured many of their

proxies by solicitation. The trustee must be an "authorized trustee" but it is reasonably certain that he will be a collection agent or a "non-profit trade association" which is merely another name for a collection agency. The "Creditors Committee" if there be one, may have no creditors upon it. The new bill provides for a "Committee of not less than three creditors." The statute defines "creditor" as "anyone who owns a demand or claim provable under this act and may include his duly authorized agent, attorney or proxy." It seems likely that the "creditors committee" will be composed wholly or partly of "agents, attorneys or proxies." In any case, we know from experience that the creditors committee will not exercise any systematic and effective control over the conduct of the trustee.<sup>5</sup>

Even under our present system where there is close judicial supervision of the conduct of the trustee much money is frittered away in various ways, especially in attorneys fees and unwise and fruitless litigation. Under the proposed new system the conditions will be worse. The trustee will generally be associated with a collection agency and he will usually employ the "office attorney" of the agency whether or not he really needs the services of a lawyer. The trustee may engage in any litigation he sees fit and will, generally speaking, be able to pay lawyers fees according to his own ideas. It may be remarked that in England Solicitors fees are not generally within the control of the trustee but are fixed on a very moderate scale by rules of Court. But notwithstanding this safeguard the English system of control by trustee and creditors committee has proved very expensive. It is reasonably certain that the proposed system of "creditor control" will prove a very wasteful and expensive one to the creditors.

## VII.

One of the principal features of the Solicitor General's scheme of bankruptcy reform relates to voluntary assignments for the benefit of creditors. Under our existing law, as well as under The English Bankruptcy Law, a voluntary assignment for the benefit of creditors is declared to be an act of bankruptcy and it is open to the creditors to nullify the assignment, have the assignor adjudged a bankrupt and his property administered in bankruptcy. Under the Solicitor General's plan the now out-

5. The Solicitor General says in his Report (p. 31): "with negligible exceptions trustees in bankruptcy are not appointed by the creditors directly, but are appointed either by the courts or by proxy-holders."

6. The English bankruptcy law provides for a creditors' committee (there called a "Committee of Inspection") and confers upon this committee a large measure of control over the trustee's administration. But in practice the English Creditors' Committee does not exercise any effective control but is little more than "a rubber stamp." Mr. Teitelbaum in his article on "Bankruptcy Administration in England" heretofore referred to says: "Actually they (the Committee of Inspection) have very little to do because the trustee is usually thoroughly competent and their approval of his actions is usually formal. Indeed great difficulty is experienced in getting such committees to take any active interest in the administration of the estate and competent trustees bother them as little as possible." (Donovan Report, The Court Press, N. Y., p. 283). The Solicitor General in his Report seems to realize that, as a rule, Creditors' Committees, do not, and will not, exercise any systematic and effective control over the trustee's administration. (See Report pp. 120, 196.) Yet a main feature of his plan of bankruptcy reform is to eliminate official control and to replace it with "Creditor Committee" control. There is another curious anomaly in his scheme of reform. He concludes that creditors do not take sufficient interest in the administration of bankrupt estates to make it advisable to give them complete control in the selection of the trustee. For this reason he desires to limit their right of choice and compel them to elect only an "authorized trustee." Yet he proposes to give the creditors the unrestricted right to appoint a "Creditors' Committee" who are to be given almost unlimited power to "direct" and control the entire administration of the trustee. If experience teaches that the creditors cannot be entrusted with full power to select the trustee it is hard to see why they should be given virtually unlimited authority to control the conduct of the trustee.

lawed voluntary assignment is to be rendered unassailable in bankruptcy and indeed is to be made a specially favored device of the bankruptcy system. Under the proposed legislation a "debtor" is to be permitted to make a general assignment for the benefit of his creditors to any "authorized trustee" whom he may select. Upon the filing of this assignment with the Clerk of the Court<sup>7</sup> it becomes the mandatory duty of the Court to enter an order "appointing the assignee as trustee of the debtor's estate." The "debtor" (assignor) is to be accorded all the rights and privileges of a "bankrupt" including the right to a discharge. The trustee (assignee) is to be given all the title, rights and privileges which the law confers upon a trustee in bankruptcy. But the provisions of the law are to be relaxed in the administration of an assigned estate and both the "debtor" and the "trustee" are to be placed in a specially privileged position. There is to be no adjudication of bankruptcy and the assignor is to be called "debtor" and not stigmatized as "bankrupt." While ordinary bankrupts must be examined by "examiners" at the first meeting of creditors and "at any meeting for the consideration of their discharge" the fortunate "debtor" is to be examined only at discharge meetings. The "debtor" may secure the confirmation of a composition without submitting to examination. The trustee secures his office by the favor of the "debtor" and not by the action of the creditors. The administration of the "debtor's" estate is to be conducted "out of court." The trustee calls and presides at creditors' meetings which presumably are held in his office. Creditors may petition the Court for a meeting of creditors at which a majority in number and amount of creditors may "appoint a trustee in place of the trustee named in the assignment," but as action to this end must be initiated "within five days after the filing of the assignment" the "assignee trustee" stands in little danger of removal.

The foregoing scheme of "assignment-administration" seems to the writer to be contrary to sound fundamental principles and to offer almost unlimited opportunities for laxity, inefficiency and waste. If a bankruptcy law provides two alternative methods of administration one better safeguarded and subject to more stringent official supervision than the other there can be no question that there will be a tendency to resort to the laxer method. There will generally be a disposition on the part of the debtor to evade the safeguards of the law and especially in those cases where the application of these safeguards is most essential for the protection of creditors. If the proposed plan is adopted there will be very few asset cases administered under the law that are not initiated under the "assignment" provisions of the Act. Furthermore, sound policy requires that the estate of a bankrupt be administered by an entirely disinterested trustee who does not hold his office by the choice and favor of the bankrupt. Indeed, courts of bankruptcy have established as a legal principle the rule that a bankrupt will not be permitted to influence in anyway the choice of the trustee who is to administer his estate. The Solicitor General in support of his "Assignment Bankruptcy" plan says that his investigation has led him to conclude "that debtors are willing to turn over their assets

for administration to assignees at a stage in their failure when they would not be willing to go into bankruptcy," and he cites statistics to show that the ratio of the debtor's assets to his liabilities are greater in mercantile assignment cases than they are in mercantile bankruptcy cases. The statistics used by the Solicitor General to support this view are those supplied by Collection Agencies and Adjustment Organizations who specialize in assignments and who habitually preach the doctrine that liquidation through assignments is to be preferred to liquidation in bankruptcy. Under an assignment the assignee takes only such property as the debtor chooses to convey to him. Under the far-reaching processes of bankruptcy the trustee takes title to all the unexempt property of the bankrupt and is also able to realize for creditors all property secreted, fraudulently conveyed, preferentially transferred or covered by unrecorded liens. It would seem that in the matter of realizing the debtor's estate all the advantages lie with the trustee in bankruptcy. Yet, if we can credit the statistics relied upon by the Solicitor General, an assignee generally gets more property in "mercantile insolvencies." A sound and rational interpretation and analysis of the statistical data relied upon by the Solicitor General will, we think, show why the assignment statistics seem to make the better showing. The collection agencies or adjustment organizations specializing in liquidations through assignments, as a rule, administer only those estates where the debtor has substantial assets. If the debtor has no assets or only nominal assets the case generally goes to the bankruptcy court. The result is that the bankruptcy courts administer practically all the no-asset and nominal asset cases, and only a part of the substantial asset cases. On the other hand, the assignees, as a rule, administer only a selected class of substantial asset cases.<sup>8</sup> These facts explain the apparently more favorable results of liquidations under assignments. In any case the embarrassed debtor generally postpones the liquidation of his estate until the last possible moment. There is little to support the view that an adjustment organization can exert any persuasive influence which enables it to induce an embarrassed debtor to execute a deed of assignment at an early stage of his financial decline when he would be unwilling to have his property liquidated in any other way.

#### VIII.

The plan of compensating the Referees upon a salary rather than a fee basis is sound in principle and should if feasible be adopted. But it seems doubtful whether the specific scheme of legislation proposed to effect this reform is practicable or workable. It is proposed that the salaries of Referees be "fixed by the Attorney General for the terms for which they are appointed" at "not more than \$10,000.00 per annum." But as "courts of bankruptcy" are to retain their authority to appoint such number of Referees as they deem necessary and to remove them at discretion, it is difficult to

7. "Together with proof of notice to creditors of the assignment and of the first meeting."

8. It is an indubitable fact known to all disinterested observers that, as a rule collection organizations administer under assignments only those estates that have relatively substantial assets. The Solicitor General, however, says: "All of the Adjustment Bureaus who answered our questionnaires stated that they handle all sizes of cases and would not refuse a case in which their members were interested even if the assets were only a few hundred dollars." The only way that this statement can be reconciled with the known facts is to assume that the "members" of "Adjustment Bureaus" are treated as not "interested" in no asset or nominal asset cases.

see how the Attorney General could fairly and satisfactorily perform the duty of fixing the Referee's salary. If the Referee is to be compensated upon a salary basis it would seem necessary that the number of Referees in each judicial district as well as the salary in each district be fixed by statute.

The proposed provisions seeking to "speed up" the procedural steps in a bankruptcy proceeding are wise and salutary amendments. The benefits to be derived from the speeding up process consist essentially in securing a quick liquidation of the assets. But these benefits are to some extent nullified by another amendment,<sup>9</sup> which deprives the Court of the authority to sell the assets through a receiver.

The proposal to incorporate a provision whereby an embarrassed wage earner debtor may, under court protection, amortize his debts over a period of not more than two years seems to embody a practicable idea. As the initiation of the proceeding is to be entirely optional with the debtor it is open to doubt whether the procedure will be much used, but in any case the plan seems to be well worth trying.<sup>10</sup>

#### IX.

We will now turn to the second general phase of bankruptcy administration, that which relates to the discharge of the bankrupt. This aspect of a bankruptcy system has so many phases both economic and social that it will not be possible to discuss all of them here and we will be able to deal only with some salient features of the subject. When the present bankruptcy act was first enacted Congress showed a disinclination to place any very stringent restrictions upon the bankrupt's right to a discharge. As originally enacted the discharge features of the law were far too liberal. Later, from time to time, the discharge provisions of the law were improved and by the amendments of 1926 these provisions were materially strengthened. As the law stands today, it contains comprehensive provisions which enable the creditors successfully to oppose the discharge of bankrupts in practically all cases where positive fraud or intentional wrong can be established.<sup>11</sup> But despite the strong inhibitions of the statute the discharge provisions of the law are today virtually a dead letter and nearly all bankrupts who apply for a discharge are granted one no matter how questionable or dishonest their past course may have been. This results from the fact that under the provisions of our law one or more of the creditors must take the initiative in opposing the bankrupt's discharge. In practice the creditors do not seem to be interested and do not avail themselves of the provisions of the law which if invoked would bar the discharge. The reasons for this indifference of the creditors are plain. They know, from experience, that, generally speaking,

the denial of the bankrupt's discharge will not enable them to collect their debts and they do not care to throw good money after bad. It is easy for the theorist to exaggerate the practical value of a discharge to the debtor and the value of its denial to the creditor. Those who have been in a position to observe the practical aspects of the matter know that in our country the bankrupt while generally anxious to secure a discharge, does not, generally speaking, consider his failure to obtain it as any very great disadvantage to him.<sup>12</sup> Quite a large percentage of bankrupts who are entitled to a discharge do not even apply for one. The relatively few bankrupts who are denied a discharge treat the denial lightly. Both classes know that they have many means of protection as against their creditors. Our comprehensive exemption statutes, our statutes of limitation, our habits of doing business under corporate form, all tend to afford a safe harbor to the debtor who cannot or does not care to pay. All these facts must be taken into account in appraising the practical value of those schemes of bankruptcy reform which are based upon the idea that the dishonest and wrongful practices of bankrupts can be effectually cured by putting more stringent restrictions upon the bankrupt's discharge.

While we cannot assent to the Solicitor General's idea that his proposed reforms regarding the bankrupt's discharge will result in profound and far-reaching benefits we do agree unreservedly to most of the general principles which he thinks should control the granting or the refusal of a discharge. The discharge of the bankrupt should be treated as a privilege and not as a right. A discharge should be granted only to the honest and unfortunate debtor. It should be denied to the dishonest and criminal debtor and to the debtor who has been guilty of acts of positive fraud or intentional wrong even though such acts are not defined as crimes. The criteria for determining the bankrupt's right to a discharge should be as definite as is practicable. As far as possible we should avoid the creation of a "twilight zone" of conduct where, after the event, mistakes of judgment may be treated as wrongful acts. The bankrupt should be required to file a formal written application for a discharge but apart from that no formal pleadings or objections should be required. Upon the hearing of the bankrupt's application, it should be incumbent upon him to establish affirmatively to the satisfaction of the Court that he is entitled to a discharge. The Solicitor General's idea of having the application heard at a creditors' meeting is a good one. It is not necessary or desirable to establish a corps of "examiners" to investigate the merits of a bankrupt's application for discharge. The bankrupt should be required to file his application for discharge at an early period of the administration of his estate and while the trustee of his estate is still functioning. It should be made the duty of the trustee to appear upon the hearing of the application and present the facts bearing upon the merits of the application. In no asset cases, where there is no trustee, the United States District Attorney or one of his assistants should be required to

9. Section 2, Clause 3.

10. The Solicitor General's bill proposes other amendments which cannot be adequately discussed in an article like the present. Perhaps the most important of these amendments are those relating to Corporate Reorganization (Section 76) and Summary Judgments upon accounts owing to bankrupt estates (Section 23). If the two amendments last mentioned were adopted they would greatly extend the scope of our bankruptcy system. These proposals require very careful consideration in respect of their constitutionality, their feasibility and their wisdom, but the matter cannot be pursued here.

11. The Solicitor General reports that the existing grounds for denying the bankrupt a discharge "embrace most of the fraudulent acts which a bankrupt would be likely to commit." (Report p. 12.)

12. The case of employees of large employers who habitually discharge employees whose wages are garnished or are intercepted by the filing of assignments presents an exception to the general rule.

(Continued on page 350)

# DEPARTMENT OF CURRENT LEGISLATION

## Dissection of Statutes

By NOEL T. DOWLING

THE prevailing opinion by Mr. Chief Justice Hughes in the case of *Crowell v. Benson*, decided by the Supreme Court on February 23, 1932,<sup>1</sup> attributes a substantial constitutional consequence to the separability clause in the Longshoremen's and Harbor Workers' Compensation Act,<sup>2</sup> and indicates that clauses of that character may play an increasingly important part in future legislation. Section 50 of the Act contains the clause in question and is as follows:

"If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons and circumstances shall not be affected thereby."

The *Crowell* case has many controversial (and some obscure) aspects. Enough of it can be stated briefly, however, to indicate the significance of the part having to do with the separability clause. An award of compensation had been made upon the finding of the deputy commissioner that the claimant was injured while in the employ of Benson and performing service upon the navigable waters of the United States. In a suit to enjoin the enforcement of the award the district judge denied a motion to dismiss and granted a hearing *de novo* upon the facts and the law, expressing the opinion that the Act would be invalid if not construed to permit such a hearing. Upon the hearing on the issue as to the fact of employment, the District Court decided that the claimant was not in the employ of Benson, and restrained enforcement of the award. This was affirmed by the Circuit Court of Appeals and, on *certiorari*, by the Supreme Court. The requirements that the injury occur upon navigable waters of the United States and that the relation of master and servant exist are declared by the Court to be "fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." Furthermore, these jurisdictional facts are said to be ones which under the Constitution must be decided independently by the judicial department.

Now, the fact of the relation of master and servant is only one of the matters which must be determined by the deputy commissioner before an award can be made under the Act. Thus, for example, there is no liability "if the injury was occasioned solely by the intoxication of the employee," §3, or if it did not arise "out of and in the course of employment," §2. The statute itself makes no express distinction between "jurisdictional" and non-jurisdictional facts, but provides generally that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." §19(a). Constitutionally, suggests Mr. Chief Justice Hughes, some of these questions can be determined by the deputy commissioner, some not. So, the specific issue: May the statute be so construed

as to take out of its apparent scope those "jurisdictional" facts which Congress cannot authorize the deputy commissioner to determine? In short, may an exception be read into the statute to cover the "jurisdictional" facts? On this, Mr. Chief Justice Hughes (joined by Van Devanter, McReynolds, Sutherland, and Butler, J. J.), says, Yes; and Mr. Justice Brandeis (joined by Stone and Roberts, J. J.), says, No. Thus, Mr. Chief Justice Hughes, after suggesting a possible construction:

"In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the act expressly requires that, if any of its provisions is found to be unconstitutional, 'or the applicability thereof to any person or circumstances' is held invalid, the validity of the remainder of the act and 'the applicability of such provision to other persons and circumstances' shall not be affected. Section 50 (33 USCA §950). We think that this requirement clearly evidences the intention of the Congress, not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends."

And, Mr. Justice Brandeis, after denying that anything in the statute warrants the construction that the right to a trial *de novo* which Congress has concededly denied as to most issues of fact determined by the deputy commissioner has been granted in respect to the issue of the employer-employee relation:

"It is said that the provision for a trial *de novo* of the existence of the employer-employee relation should be read into the act in order to avoid a serious constitutional doubt. It is true that, where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction. . . . But this act is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. . . . Neither may it do so to avoid having to resolve a constitutional doubt. To hold that Congress conferred the right to a trial *de novo* on the issue of the employer-employee relation seems to be a remaking of the statute and not a construction of it."

So much, for the moment, for that particular clause and the opposing opinions. In the form in which the clause is reproduced above, it has come to be a familiar part of important federal legislation. It first

1. 52 S. Ct. 285.  
2. Act of March 4, 1927, 44 Stat. 1424; U. S. C. Title 33, §§901-950.

3. In the text of his opinion, Mr. Justice Brandeis cited the following: *Butts v. Merchants & Miners' Transportation Co.*, 230 U. S. 126, 133, 33 S. Ct. 964, 57 L. Ed. 1422; *The Employers' Liability Cases*, 207 U. S. 463, 500-502, 28 S. Ct. 141, 52 L. Ed. 297; *Trade Mark Cases*, 100 U. S. 82, 99, 25 L. Ed. 550; *United States v. Fox*, 95 U. S. 670, 672, 678, 24 L. Ed. 538; *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563. Cf. *Illinois Central R. R. Co. v. McKendree*, 203 U. S. 514, 529, 27 S. Ct. 153, 51 L. Ed. 298; *Cella Commission Co. v. Bohlinger* (C. C. A.), 147 F. 419, 423, 424, 8 L. R. A. (N. S.) 537.

appeared in the Shipping Act of 1916.<sup>4</sup> It was included in the Future Trading Act of 1921.<sup>5</sup> The validity of that Act was involved in *Hill v. Wallace*,<sup>6</sup> and while the clause (in §11) was adverted to it was accorded no importance in the decision. "Section 11," said the Court, speaking through Taft, C. J., "did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court." For this he cited *United States v. Reese*,<sup>7</sup> *Trade-Mark Cases*,<sup>8</sup> and *Butts v. Merchants & Miners Transportation Co.*<sup>9</sup> "To be sure," continued the Court, "in the cases cited, there was no saving provision like §11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act."<sup>10</sup>

State statutes reflect the influence of the federal form. Thus Vermont, Laws of 1931, Section 5, No. 90, to make uniform the law relating to aviation:

"If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this act, or the application of such provision to any person or circumstances other than those as to which it is held invalid, shall not be affected thereby."<sup>11</sup>

In a sense, these clauses represent a continuing endeavor on the part of legislatures, not only to give the courts more freedom in the dissection of statutes, but also to hold judicial decisions within narrower bounds than are commonly supposed to exist when a court has decided that a statute is unconstitutional,<sup>12</sup> and indeed to impress upon the courts the importance of a clearer and more explicit enunciation as to the basis upon which a statute is held to be unconstitutional. In the course of this endeavor it is but natural that the clauses should take different forms and should appear to be going through certain evolutionary changes. Compare, as examples, the following from state statutes:

California, Statutes 1923, Chapter 341, Sec. 11, Motor Vehicles Transportation Act:

"If any section, sub-section, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. The legislature hereby declares that it would have passed this Act and each section, sub-section, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, sub-sections, clauses or phrases be declared unconstitutional."<sup>13</sup>

New York, Laws of 1922, Chapter 590, Section 174, General Business Law:

"In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of any of the remaining portions of the article."

Wisconsin, Laws of 1931, Chapter 444 (c) amending the statute relating to foreign owned vehicles:

4. 39 Stat. 728, U. S. C. Title 46 §§801-846.

5. Act of August 24, 1921, 42 Stat. 187.

6. (1922) 259 U. S. 44.

7. (1875) 92 U. S. 214.

8. (1879) 100 U. S. 82.

9. (1913) 230 U. S. 136.

10. Differences in the congressional form will appear on comparing the clause in the Revenue Act of 1921, 42 Stat. 227, U. S. C. Title 26 §§2715ss. A further modification will be found in the Agricultural Marketing Act, 46 Stat. 11, U. S. C. Title 7, §§521ss.

11. Similarly, §2, Ch. 96, Wisconsin Laws of 1931, relating to oleomargarine.

12. For a discussion of the use of the term "unconstitutional" and the effect of declaring a statute unconstitutional, see Note (1929) 29 Columbia Law Review 1140.

13. For a similar provision in 1931 legislation, see Colorado Laws 1931, Ch. 74, §27, relating to cosmetology.

"If any of the exemptions provided for in paragraph (b) of this subsection shall be held invalid and unconstitutional by any court of competent jurisdiction, the class or classes held to be invalidly exempted shall forthwith become subject to the provisions of paragraph (a) as if no exemption had been provided for. Such declaration of invalidity as to any of the foregoing exempted classes shall not affect the validity of any other provision of this subsection, and all such provisions are hereby declared to be severable."

Pennsylvania, Laws of 1931, No. 203, relating to highways and bridges:

"It is the intention of the General Assembly, that, if this act cannot take effect in its entirety because of the judgment of any court of competent jurisdiction holding unconstitutional any part or parts thereof, the remaining provisions shall be given full force and effect as completely as though the part or parts held unconstitutional had not been included herein."<sup>14</sup>

A comparison of the foregoing examples with the federal form discloses at least one striking difference. The former are framed as if severance depends "upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment,"<sup>15</sup> and as if the constitutionality of any particular part is a constant, irrespective of its application. The latter sets forth the clear conception (which is good constitutional law) that a statute or part thereof may be unconstitutional as applied to some persons or circumstances and constitutional as applied to other persons and circumstances. In this aspect, the latter indicates a striving for the particular, as opposed to the general, as the basis for constitutional decisions.<sup>16</sup>

The underlying problem throughout is to ascertain the legislative intent. That is elementary, but it is none the less important. Some may become cynical about the matter and doubt whether there is any such thing as legislative intent, and, if there is, whether it can be discovered. Fortunately, there are extrinsic aids to which the courts may turn. One of them may be mentioned, which when properly and adequately prepared serves as an excellent means for revealing the legislature's intent: the committee report.<sup>17</sup> But, aside from extrinsic aids, of what avail is a separability clause in the statute itself? "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."<sup>18</sup> This was said by Mr. Chief Judge Cardozo in a case where the Court of Appeals of New York was construing a statute which contained no separability clause. Where there is such a clause, said Mr. Justice Brandeis in *Dorcy v. Kansas*,<sup>19</sup> it "provides a rule of construction which may sometimes aid in determining" the legislative intent. "But," he adds, "it is an aid merely; not an inexorable command." Estimates vary as to the effect of the clauses. In one review of the cases the attitude of the courts towards them is declared to be "one of scepticism," with a "tendency to hold that the legis-

14. Cf. another form in Pennsylvania Laws 1931, No. 202, p. 594.

15. Cardozo, C. J., in *People ex rel Alpha Portland Cement Co. v. Knapp* (1920), 230 N. Y. 48, 60, where he denies that it does so depend and adds that the "principle of division is not a principle of form."

16. As to the basis on which decisions are rendered, see Note (1930) 30 Columbia Law Review 360, "The Consideration of facts in 'due process' cases."

17. For a discussion of committee reports, the basis upon which they are formulated, their utility to the profession, and the desirability of a more extended use of them, see Report of the Standing Committee on Noteworthy Changes in Statute Law, 1929, 54 Reports of the American Bar Association 390.

18. *Supra*, Note 15.

19. (1924) 264 U. S. 286, 290.

lature really did not mean what it said, and that if it did, its intent was ineffective, being either a usurpation of judicial or a delegation of legislative power."<sup>20</sup>

Suppose a legislature, adopting in part the terminology of Mr. Chief Justice Taft in *Hill v. Wallace*,<sup>21</sup> expressly declares its intent that the courts should "dissect" the statute. Let us assume that this includes the intent on the part of the legislature—or to make a clearer case, insert in the statute appropriate language to that effect—to go just as far as it constitutionally can toward accomplishing the objects of the statute and to authorize the court to make the necessary implications and exceptions for the purpose of saving all that can be saved of the statute. In effect, the legislature would be saying to the courts: "Here is what we want to do. We do not know whether we can do it all or not. We want to do the most that we can. How far we can go, what persons we can reach and in what circumstances, is a constitutional question. You only can decide it. But we say to you that, when you do decide it, the limit which you thereby set is the limit we intend for the statute."

This, of course, would produce an element of uncertainty as to the effective scope of the statute. The terms of the statute would still set the maximum coverage, but the courts would at least be admonished against determining the validity of the statute on the basis of the maximum which *could* be done, rather than what actually *was* done, under it.<sup>22</sup> There is nothing new about a statute fluctuating in its operability dependent on constitutional issues: not necessarily because the statute so provides but because, *e.g.*, due process so permits. If any doubt existed, it was settled by the *Housing Cases*.<sup>23</sup> Moreover, it is of interest to note that provisions are finding their way into statutes which condition the applicability of the statute upon the determination of constitutional questions. An illustration appears in the statute involved in the *Crowell* case: the application of the compensation act is limited to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law." §3(a). This, as Mr. Chief Justice Hughes pointed out, "had in view the decisions of this Court with respect to the scope of the exclusive authority of the National Legislature." Again, in a South Carolina Act of 1931<sup>24</sup> to raise revenue by the imposition of an excise tax upon electric power generated and sold within the state, this proviso is included: "that the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities." §1 (c).

Whatever may be the nature of the function<sup>25</sup> involved, I take the *Crowell* case to signify that the Su-

preme Court will accept an enlarged mandate from Congress in the matter of dissecting a statute on constitutional lines.<sup>26</sup> At any rate, the Court called to its aid the separability clause quoted at the beginning of this note and found in it evidence of the intention and assurance of the purpose of Congress. Whether the Court would have arrived at the same result without the aid of the clause is at least speculative.<sup>27</sup>

A word may not be out of place, from the legislative drafting point of view, about the use and phraseology of separability clauses. Since such a clause in a given statute is concerned with the intent of the legislature in *that statute* it seems futile to talk about a fixed form for use generally, *unless* we assume that the legislative intent as to separability in all statutes is the same.<sup>28</sup> Uniformity may tend to defeat the very purpose for which the clauses are designed. "It is to be feared that, as the clauses become more common and assume the appearance of mere formality, less and less weight will be given to them."<sup>29</sup> Their efficiency can be enhanced if they are used with discrimination and are carefully drafted. But careful drafting here, as elsewhere, presupposes definite decisions concerning what the legislature desires to accomplish. If they are to be used to convey legislative intent, that commodity should be prepared for shipment before the journey begins.

26. Severance in a state statute is not a federal question. "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court. *Gatewood v. North Carolina*, 203 U. S. 531, 543; *Guinn v. United States*, 238 U. S., 347, 366; *Schneider Granite Co. v. Gast Realty Co.*, 245 U. S. 288, 290. In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court. Compare *Myers v. Anderson*, 238 U. S. 368, 381; *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 311. In cases coming from the state courts, this Court in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court."—Brandeis, J., in *Dorchy v. Kansas* (1924) 264 U. S. 286, 290-1.

27. "The whole tendency during recent years, at least in this court, has been to apply the principle of severance with increasing liberality."—Cardozo, C. J., in *People v. Mancuso*, (1931) 255 N. Y. 463.

28. Furthermore, it seems clear that since it is the legislative intent back of the *given statute* which we are seeking to ascertain, not much (if any) help is to be got—and indeed some confusion is likely to be produced—by the citation of cases having to do with the intent in *other statutes*.

29. Note (1927) 40 Harvard Law Rev. 626, 629.

### A Strangely Accurate Prophecy

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I was reading yesterday an address delivered by Mr. Justice (then Judge) Holmes, before the Harvard Law School Association, in November, 1886, and ran across the following:

"The law has got to be stated over again; and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago. And now I venture to add my hope and my belief, that, when the day comes which I predict, the Professors of the Harvard Law School will be found to have had a hand in the change not less important than that which Story has had in determining the form of the textbooks of the last half-century."

This is a strangely accurate prophecy of the work being done by the American Law Institute as to scope, time and the prominent part taken by professors of Harvard and I wonder if the matter is not of general professional interest. The address is printed in Vol. 8 of Reed's "Modern Eloquence."

FRANK WELLS.

Oklahoma City, Feb. 12.

20. Note (1927) 40 Harvard Law Rev. 626. The note concludes that "neither of these objections appears to be sound." For other estimates, see Note (1927) 25 Mich. Law Rev. 523, 524. ("The authorities are generally in accord in holding that the 'saving' section is merely declaratory of the well-established general rules of construction"; and (1914) 2 California Law Rev. 319, 320 ("It is hardly reasonable that such a provision should be permitted to influence the established rules of construction.")

21. See the full quotation above, the case being cited in footnote 6. 22. "The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done." *Stuart v. Palmer*, (1878) 74 N. Y. 183, 188. Cf. *Wuchter v. Pizutti* (1928) 276 U. S. 13.

23. *Block v. Hirsh*, (1931) 256 U. S. 135; *Chastleton Corp. v. Sinclair*, (1924) 264 U. S. 548; *Peck v. Fink* (1924) (App. D. C.) 2 F. (2d) 913, *Certiorari denied*, (1925) 266 U. S. 631.

24. 37 Statutes at Large 857, 361.

25. Mr. Chief Justice Taft in *Hill v. Wallace* above, characterized it as "legislative work beyond the power and function of the court," and Mr. Justice Brandeis in the quoted extract from his dissenting opinion in the *Crowell* Case, declares that "the Court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision."

# LAWYERS AND LITERATURE

While at Oxford Blackstone Attained Scholastic Prominence in Realm of Poetry and Obtained Gold Medal for Verses on Milton—Specimens Inspired by His Abandoned Muse—Bacon—Sir John Selden—Literary Pursuits of "Bloody McKenzie"—Sir William Jones, Judge and Famous Oriental Scholar—Legal Personages and the Edinburgh Review—Curran's Rollicking Verses—Sir Frederick Pollock, the "Unsurpassed Parodist," Etc.

BY VERE RADIR NORTON  
*Member of the Los Angeles Bar*

"THE old saying, 'there be three roads to success in the common law—sessions, pleading, and miracle'—may well be amended by adding a fourth, hardly less certain than either of the first two—authorship."

Lord Brougham, one of the foremost lawyers of his time, has hazarded the above opinion in his *Miscellanies*. However, the learned gentleman referred to the writing of law books. Most of the great names in legal history, when connected with authorship, are associated with law writings—but there are many gems of pure literature, from the pens of famous lawyers, still shining through the dust heaps of the centuries.

The preliminary education of lawyers tends to produce scholars, and it is inevitable that an active and erudite mind should often possess great versatility. It is true that when a lawyer takes to literature, more often than not he eschews the law and devotes himself exclusively to letters. A vast number of famous writers of present and bygone days were trained in the law, but comparatively few of them have gained eminence in both the fields of law and literature. Seldom does the average reader pause to remember that Sir Walter Scott was long a struggling barrister, or that Robert Louis Stevenson used to walk the halls of Edinburgh waiting for the brief that never came! The names of lawyers, celebrated as litterateurs, whose fame is known to readers in every country, are far too many to record. Herein I propose to refer only to the literary works of men who during their lifetime shone in the legal world, and were merely incidentally authors of other than legal lore.

To paraphrase Emerson, by necessity, by proclivity, and by delight I quote—and copiously! But, even so, the limits of this brief resumé preclude quotation to the extent which I might desire, though I may come dangerously close to the error which precedent ascribes to the ancient lawyers, of whom Isaac Disraeli says, "they used to quote until they had stagnated their own cases!"

The writer of fiction usually resorts to the trite phrase "he read Blackstone" to indicate that his hero studied law. Sir William Blackstone (1723-1780) is the most widely recognized legal name in the whole category of his profession. While he was at Oxford he attained scholastic prominence in the realm of poetry, and obtained a gold medal of Milton, for verses on that poet. Unquestionably, his early training and natural aptitude for literary expression influenced all of his subsequent legal

writing, for his style has ever been the subject of profound admiration. Lord Yelverton, Baron Avonmere, said "he it was who first gave to the law the air of science. He found it a skeleton, and he clothed it with life, color and complexion; he embraced the cold statue, and by his touch it grew into youth, and health, and beauty."

At eighteen years of age, he decided on the law as his career, and turned from the more amusing pursuits of his youth for severer studies. So at this ripe old age he produced that effusion called "The Lawyer's Farewell to his Muse," which was afterwards published in Dodsley's *Miscellanies*, and is often erroneously referred to as the only known poem from his pen. The sonorous phrases of this long poem seem rather endearing indications of the extreme youth of the poet, on the threshold of his great career. The first stanza reads as follows:

As by some tyrant's stern command,  
A wretch forsakes his native land,  
In foreign climes condemn'd to roam,  
An endless exile from his home;  
Pensive he treads the destin'd way,  
And dreads to go, nor dares to stay;  
Till on some neighboring mountain's brow  
He stops and turns his eyes below;  
There, melting at the well-known view,  
Drops a last tear and bids adieu:  
So I, thus doomed from thee to part,  
Gay queen of fancy and of art,  
Reluctant move with doubtful mind,  
Oft stop, and often look behind.

to which I append a portion of the last stanza:

Thus, though my noon of life be past,  
Yet let my setting sun at last  
Find out the still, the rural cell  
Where sage Retirement loves to dwell!

There are eight stanzas of varying length, ranging from six to eighteen lines.

Despite the fact that certain reference works state that these verses have been "much admired," it would appear, in the light of modern criticism, that Blackstone displayed his wisdom in suppressing the latent desire to break into rhyme. He did not fall into the error for which Montaigne adversely criticized Cicero, who, he indicated, should have known better than to have considered his poems worthy of publication. Montaigne says "'Tis no great imperfection to write ill verses; but it is an imperfection not to be able to judge how unworthy bad verses were of the glory of his name."

Blackstone left a small collection of juvenile poems, both originals and translations, not with a

view to publication. Certain of his verses on the death of Frederick (father of George III), Prince of Wales, in 1751, appeared in the Oxford Collection under the name of J. Clitherow (publisher), and were esteemed one of the best compositions in that collection. Blackstone had pledged his publisher to secrecy, and it was evidently deemed no discredit in those times for a man to have his name affixed to the production of another person. After Blackstone's death Mr. Clitherow considered himself absolved from his promise of secrecy and hastened to avow the name of the true author. Perusal of these verses leads to the conclusion that Mr. Clitherow was more sinned against than sinning in having allowed their authorship to have been imputed to him. "Other Times, other Manners," and perhaps it was but natural that a rising young man in the middle of the eighteenth century should have penned such lines as

'Twas on the evening of that gloomy day,  
When Frederic, ever loved and ever mourn'd,  
(Such Heaven's high will, and who shall disobey?)  
To Earth's cold womb in holy pomp return'd.

With sullen sound, the death-denouncing bell  
Proclaim'd aloud the dismal tale of woe,  
The pealing organ join'd the solemn knell  
In mournful notes majestically slow.

Who shall to arts their pristine honor bring?  
Rear from the dust fair Learning's laurel'd head?  
Or bid rich Commerce plume her daring wing?  
Arts, Learning, Commerce, are in Frederic dead.

There was much controversy and jealousy amongst lawyers of his time over Blackstone's legal writings, one critic even going so far as to say "any lawyer who writes so clearly as to be intelligible (to anyone) is an enemy of his profession." His work bears the impress of classical training and polish, in a day when law writers seemed more anxious to conceal than to reveal. But in that day even so enlightened a man as he could declare with conviction "to deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God in various passages both of the Old and New Testament."

Francis Bacon, Baron Verulam and Viscount St. Albans, generally referred to as Lord Bacon (1561-1626) and his great rival, Sir Edward Coke (1552-1624), are two from whose names the passing years have rubbed most of the tarnish which somewhat soiled them during the lives of those illustrious gentlemen. Bacon was probably the greatest lawyer-author Great Britain ever produced. The volume of his writings was enormous and he is often called the "parent of modern philosophy." Practically all of his works, including the *Novum Organum*, were written in Latin. He was anxious also to have what he had written in *English* preserved in Latin, which he designated "that universal language which may last as long as books last." The English language is the only object, in his great survey of art and nature, which owes nothing of its excellence to the genius of Bacon. He failed to realize that the English language would one day be capable of embalming "all that philosophy can discover or poetry can invent." His philosophical works, in his own days and amongst his own contemporaries, were not only not comprehended, but often ridiculed, and often reprobated! He called himself the "servant of posterity," and in his Will

set forth a remarkable legacy: "My name and memory I leave to foreign nations, and to mine own countrymen, *after some time be passed over.*"

After he presented the *Novum Organum* to the king, it was reported that "the king cannot forbear sometimes in reading the Lord Chancellor's last book to say, that it is like *the peace of God, that surpasseth all understanding!*"

Bacon was impeached for corrupt administration of the Chancery, having been convicted of bribe-taking, and of taking "presents" from litigants in pending cases. In defending himself he said that he as often decided against the donor of the gift as in his favor!

Sir Edward Coke, Lord Chief Justice, as Isaac Disraeli said, was a "mere great lawyer, and, like all such, had a mind so walled in by law-knowledge, that in its bounded views it shut out the horizon of the intellectual faculties and the whole of his philosophy lay in the statutes." His contempt for Bacon's literary activities was great, his own extensive writings being exclusively on the law. In the first edition of the *Novum Organum* there appears the proud device of a ship passing between the pillars of Hercules. On a copy which had been presented by the author to Coke, that profound expositor of the law wrote these feeble and venomous verses:

"It deserveth not to be read in schools,  
But to be freighted in the Ship of Fools."

Both Coke and Bacon suffered disgrace during their lives, Coke being sent to the Tower and Bacon into involuntary retirement from public life after his impeachment. Furthermore, Coke, in his disgraceful domestic difficulties with his wife and daughter, appears not only a cruel father, but a sadly hen-pecked husband!

Bacon's ever-vigilant interest in scientific experiment led to his death. He died of a chill which he suffered whilst stuffing a chicken with snow, to observe the effect of refrigeration on the preservation of meat.

It frequently happens that a man's *conversation* is much better worth preservation than that which he writes. Sir John Selden (1584-1654) affords an illustration of this fact. Clarendon says "he was far more direct, simple, and effective as a speaker than as a writer." He wrote abundantly and ponderously on various subjects, but is chiefly remembered for his sparkling "Table Talk," compiled and edited by his amanuensis, Richard Milward. Under the heading "Books and Authors," it is recounted that he said "In quoting of books, quote such authors as are usually read, others read for your own satisfaction, but do not name them." However, few authors have "quoted" more than Selden himself. Authorship had its dangerous side: Selden's "History of Tithes," (1618), so offended King James, that the author was severely censured by the High Commission Court, and later cast into prison for denying that Parliament owed its privileges to the Crown. During his incarceration he prepared his "History of Eadmer," enriched by his notes. Selden's early friend, Ben Johnson, described him as "the lawbook of the Judges of England, the bravest man in all languages."

There are strange inconsistencies in the lives of men. He who gained the sobriquet of "Bloody Mackenzie" spent the latter part of his life in peace-

ful literary pursuits. This was Sir George Mackenzie, (1636-1691), King's Advocate in Scotland, styled the "Blood-thirsty Advocate," for his cruel and vigorous endeavors to force submission to the King. Many of his prosecutions were leveled at the Covenanters. He founded the Advocates' Library in Edinburgh in 1689, and in 1690 he retired to Oxford, where he was admitted as a student. He wrote a number of books, including "A Vindication of the Government of Charles II," in which he defended the cruel practice of torture to extract confessions from those accused of political crimes, and, fit subject for a Scotsman's pen, "The Moral History of Frugality." He wrote an "Essay on Preferring Solitude to Public Employment," in 1665, wherein he sketched the delights of retirement. However, he proceeded to spend many years thereafter in public employment. In this essay he says, "fame is a revenue payable only to our ghosts."

Viewed through the vista of the years, the titles of some of Mackenzie's works are in themselves interesting and illuminative commentaries on the man, for example: "Moral Gallantry, a Discourse Proving that the Point of Honour Obliges all Men to be Virtuous," and "A Moral Paradox Proving that it is much Easier to be Virtuous than Vicious, and a Consolation against Calumnies." His novel, "Aretina, or the Serious Romance," an Egyptian story, was so labored and stilted in style and destitute of personal interest as to be omitted from his collected works. However, "Caelia's Country House, and Closet, a Poem," and the "Paraphrase of the 104th Psalm" find a place in the collection.

In pleasing contrast to the somewhat dubious characters of several of the above named luminaries, we find the refreshing excellence of Sir William Jones, (1746-1794), Judge in Bengal and famous Oriental scholar. James Freeman Clark in "Ten Great Religions," in his chapter on Brahmanism, in expressing gratitude for the wealth of information available pursuant to the researches of Sir William Jones, refers to him as "one of the few first-class scholars whom the world has produced. In him was joined a marvellous gift of languages with a love for truth and beauty, which detected by an infallible instinct what was worth knowing in the mighty maze of Oriental literature. He had also the rare good fortune of being the first to discover this domain of literature in Asia, unknown to the West until he came to reveal it."

He founded the Asiatic Society in 1784, shortly after his arrival in Calcutta, for inquiring into the history and antiquities, the arts, sciences and literature of Asia. As a lawyer, a Judge and a student of natural history, his ardor of study was equally apparent.

He leaves a quaint record of his mode of literary composition. After having fixed on his subject, he always added the *model* of the composition, and thus boldly wrestled with the great models of antiquity. On board the frigate which was carrying him to India, he projected the following works, and noted them in this manner:

1. Elements of the Law of England.  
*Model*—The Essay on Bailments. Aristotle.
2. The History of the American War.  
*Model*—Thucydides and Polybius.
3. Britain Discovered, an Epic Poem—Machinery—Hindu Gods.  
*Model*—Homer.

4. Speeches, Political and Forensic.

*Model*—Demosthenes.

5. Dialogues, Philosophical and Historical.

*Model*—Plato.

He stated that he knew critically eight languages—English, Latin, French, Italian, Greek, Arabic, Persian and Sanscrit; less perfectly eight others: Spanish, Portuguese, German, Runic Hebrew, Bengali, Hindu, Turkish, and was moderately familiar with twelve more: Tibetan, Pali, Phalavi, Devi, Russian, Syriac, Ethiopic, Coptic, Welsh, Swedish, Dutch and Chinese.

He was in open sympathy with the American Revolution and corresponded with many of its leaders.

Amongst his many compositions, is a long poem, "Caissa," written in imitation of Ovid, presenting a legend of the origin of the game of chess. Therein the invention of the game is poetically ascribed to Mars—though it is certain that the game was originally brought from India! He says:

"No mortal hand the wondrous sport contriv'd,  
By gods invented, and from gods deriv'd."

Clark says of Sir William Jones that he was one who had the right to speak of himself, as he has spoken in these lines:

"Before thy mystic altar, heavenly truth,  
I kneel in manhood, as I knelt in youth,  
Thus let me kneel, till this dull form decay,  
And life's last shade be brightened by thy ray.  
Then shall my soul, now lost in clouds below,  
Soar without bound, without consuming glow."

Lord Campbell calls Thomas Erskine (1750-1824) "by far the first advocate that ever practiced at the English Bar," but an "indifferent" Chancellor. Erskine was a vigorous advocate for freedom of the Press, and, in spite of the advice and warnings of friends who feared that he would fatally injure his chances for political advancement, was counsel for the defense in the famous prosecution of Thomas Paine.

Erskine held the office of Chancellor but for one year, resigning with the general change of Government. Afterwards, amongst his other activities, it is recorded that "he also strove to divert ennui, and to recover his lost ground, by publishing his novel, *Armata*." This novel was an imitation of the "Utopia" of Sir Thomas More, and of "Gulliver's Travels." It was fairly successful in its day, but is long since forgotten. Erskine's "lost ground" was the result of his adherence to the unpopular side of the current political controversies. He was a consistent Whig throughout his lifetime and some of the famous Tories never forgave him. In spite of the general acclaim with which he was greeted, it is reported that such a staunch Tory as Sir Walter Scott presented him with a very cold shoulder indeed, at the time of a visit by Erskine to Edinburgh.

Two famous legal contemporaries were chiefly instrumental in the founding of the Edinburgh Review: Lord Francis Jeffrey (1773-1850), and Henry Brougham, Baron Brougham and Vaux (1778-1868). Lord Jeffrey was for twenty-seven years its editor, during which time he rose to the position of Lord of Sessions and was for sixteen years one of the ablest and most popular Judges of the Supreme Court of Scotland. He was accounted the foremost critic of his age. His essays covered general literature, literary biography, history and historical mem-

oirs, poetry, novels, tales and prose, books of fiction, general politics, philosophy of the mind, metaphysics and jurisprudence. In a review of Cromek's *Reliques of Robert Burns*, Jeffrey wittily observes: "We can see no propriety in regarding the poetry of Burns chiefly as the wonderful work of a peasant, and thus admiring it much in the same way as if it had been written with his toes!"

In early youth, Jeffrey wrote a great quantity of verse and two plays, which were not, however, published. He once, it is said, went so far as to leave a manuscript with a publisher, but, on second thought, rescued it before it had been considered.

The *Edinburgh Review* was the vehicle of the earliest productions of Lord Brougham's fertile pen, and was enriched by his contributions on nearly every subject with which the improvement of mankind is connected. He had an almost uncanny breadth of knowledge and felicity of expression. In an admirable preface to some of Brougham's collected works, the commentator says, "As a specimen of his power to bring the abstruse sciences to the level of ordinary minds, and to invest them with the charms of an eloquence of which ordinary scientific writers are never masters, the preliminary discourse on the objects, pleasures and advantages of science, which introduced to the public the 'Library of Useful Knowledge' has been selected. This memorable essay obtained such a hold on the public mind in Europe, that it was not only circulated to the amount of some hundreds of thousands in England, but was immediately translated and published in all the European languages. The name of the author was *not prefixed* to the original English edition of this discourse; it was needless—there was only one individual living by whom it could have been produced!"

This essay of Lord Brougham's outlines the whole range of scientific study, with illuminating and alluring illustration of each branch. He says, "The sciences may be divided into three great classes: those which relate to *number and quantity*, those which relate to *matter*, and those which relate to *mind*; connected with all the sciences, and subservient to them, although not one of their number, is *history*, or the record of facts relating to all kinds of knowledge."

In his dissertation on George the Fourth and Queen Caroline, (whose defender he was in the famous trial), the following remarks on the abuses of the Press, and the difficulty of obtaining relief through actions for libel, might have been penned yesterday and refer to our own times:

"The state of the Press is every day bringing matters nearer to the point where no man can submit to serve the country who has either nice feelings of honor and reputation, or a refined sensibility of heart—and we feel perfectly convinced that the loss is prodigious which its service must sustain by so miserable a selection as must soon be made of those qualified to engage in it."

Brougham had the faculty of delineating a character, as he saw it, in a few pithy phrases, as, for example, his reference to Sheridan: "——he delighted in gaudy figures, he was attracted by glare; and cared not whether the brilliancy came from tinsel or gold; from the broken glass or the pure diamond." And he is said in an ironical way to have defined a lawyer as "a learned gentleman

who rescues your estate from your enemies and keeps it to himself."

John Philpot Curran (1750-1817) belongs to that scintillating group of Irish lawyers whose fame depends for the most part upon their courage and oratory, but whose written works, considered worthy of preservation for posterity, are few. He possessed talents of the highest order, and his wit, drollery, eloquence and pathos were irresistible. He had been originally designed for the Church and educated at Trinity College, Dublin, but afterwards went to London and entered one of the Inns of Court. During his first years at the bar, Curran, in addition to his youth, had the further political disadvantage of being Irish, which is tantamount to disclosing that he was also desperately poor. A friend says of him that at this time he lived by his pen, and wrote, amongst other things, a song entitled "The Deserter's Lamentation," which became very popular. His *son*, however, denies that he wrote at all, and declares that he lived upon his parents or his richer friends. Nevertheless, he had a taste for versifying, which he continued to exercise all of his life, several trivial examples thereof being preserved.

Curran's youth was rollicking and dissipated, and he was party to no fewer than five duels, none with serious results. It is said that the numbers of killed or wounded amongst the members of the bar of that period were considerable, the duello being quite common. Curran, as Grand Prior thereof, wrote the charter song of a jovial society of boon companions, which met every Saturday night, and who designated themselves "Monks of the Screw"—the only stanzas extant being:

When St. Patrick our Order created,  
And called us the Monks of the Screw,  
Good rules he revealed to our Abbot,  
To guide us in what we should do.  
But first he replenished his fountain  
With liquor the best in the sky,  
And swore, by the word of his Saintship,  
That fountain should never run dry.

My children! be chaste—till you're tempted;  
While sober, be wise and discreet,  
And humble your bodies with fasting,  
Whene'er—you've got nothing to eat!  
Then be not a glass in a convent,  
Except upon festival found,  
And, this rule to enforce, I ordain it—  
A festival all the year round!

But he had so great an admiration for and familiarity with the writings of the ancient orators of Greece and Rome that he translated several of their works, without a view to publication.

Sir Thomas Noon Talfourd (1795-1854) wrote a "Life of Charles Lamb" in addition to several plays, one of which, *Ion*, ranks not only amongst the most beautiful closet dramas, but the most successful acting plays in the English language. It was first produced at Covent Gardens Theatre in 1836, with Macready in the title role. It was successful not only in England, but in the United States. His ethical ideals find echo in the advice *Ion* gives to his "wisest friend" to

Fill the seats of justice  
With good men—not so absolute in goodness  
As to forget what human frailty is.

and in the apostrophe:

An oath! O, gentle *Ion*,  
What can have linked thee to a cause which needs

A stronger cement than a good man's word?  
There's danger in it!

Great interest was naturally manifested by Talfourd's companions at the bar when he proved not only to have won distinction as a lawyer, but also as a playwright. An amusing story is preserved by one who knew the family well, that Frank Talfourd, going circuit with his father, was asked by Baron Martin (who was supposed to have read nothing but law, and to know nothing but that and the science of trainers, jockeys and horses), what his father's favorite play was. The answer was "Romeo and Juliet." The Baron undertook to read it, and the next morning announced that he had done so. "What do you think of it?" asked young Talfourd. "Think of it?" was the answer. "Why, it's a tissue of improbabilities from beginning to end!"

In 1849 Talfourd was raised to the Bench in the Court of Common Pleas and knighted. He died suddenly while charging a grand jury.

The famous novel, "Ten Thousand a Year," is the opus of Samuel C. Warren (1807-1877), the first chapters appearing in Blackwood's Magazine in 1839. At the first Warren was anxious to disguise the authorship, his main reason apparently being that he might ask every one with whom he came in contact what he thought of the new novel, and freely glow with pride or burn with indignation according to the tenor of the answer! It was published in three dense volumes in 1841 and had an enormous sale. It was translated into French, Russian and other languages. The well-constructed plot turns upon the validity of certain title deeds, and a number of legal points are involved. Warren's handling of these was criticized by experts, and was justified by the author in elaborate notes in subsequent editions. His legal characters were declared to be caricatures, but the cleverness of the farcical portraits, "Tittlebat Titmouse," "Oily Gammon," and "Mr. Quicksilver" (Lord Brougham), established the book as one of the most popular novels of the century.

He had difficulty in attaining recognition of his very considerable legal ability, since he was so definitely stamped as a prominent novelist. However, he eventually reached a high place in his profession, and after three years in Parliament, was appointed Master of Lunacy in 1859. This appointment was amply justified by the ability with which he fulfilled his functions.

Warren published various other works, including two novels and several law books. Amongst these is a volume of his lectures delivered before the Incorporated Law Society of the United Kingdom, on the "Moral, Social and Professional Duties of Attorneys and Solicitors," which are exceedingly pleasant to read. In averring that no one is immune from possible enforced contact with scions of the law, he says ". . . Bishops may have to run the gauntlet of a law-suit, before assuming their Miters, and—to pass for a moment from grave to gay—sweet Jenny Lind, warbling, larklike, high in the regions of song, is suddenly stricken by a certain missile of ours, to-wit: a writ, and drops terrified through the air thrilling with her melody, into the arms of—her attorney!" The little lady had, even as do certain "stars" today, broken a contract!

Sir Theodore Martin (1816-1906), a distinguished lawyer, carried on an extensive business

and varied professional cares with literary work. His translations comprise many of the works of Goethe, Schiller, Horace, and Catullus, and he has written "Essays on the Drama," "Madonna Pia," "Life of Lord Lyndhurst," "Life of the Prince Consort," and a "Life of Helena Faucit, Lady Martin," his wife, who was a celebrated actress. In collaboration with William Edmonstoune Aytoun, a Scottish poet and prose writer (whose biography Martin wrote), he published the once famous "Bon Gaultier Ballads." The first edition of these ballads appeared in 1845, and the sixteenth in 1903, with a delightful preface by Martin, then about eighty-seven years old. He says of these productions "the object was not merely to amuse, but also to strike at some prevailing literary craze or vitiation of taste." He then proceeds to deplore the popularization of novels and songs, of which "the ruffians of the Newgate Calendar were the accepted heroes"—together with their lady-loves! With Aytoun he produced a great quantity of verse, much of it in the form of parody of the style of famous poets, of whom he says "assuredly the poets parodied had no warmer admirers than ourselves." And "never, probably, were verses thrown off with a keener sense of enjoyment"—many of which were composed on rambles to favorite spots in the suburbs of Edinburgh. Whilst much of the pointed wit of the pieces must of necessity be dulled to the present ear by lack of knowledge of the then current political or general allusions, no one can avoid appreciative chuckles on reading the musical and fulsome absurdities of these appealing ballads. He says "it is sixty years since most of these verses were written, with the light heart and fluent pen of youth, and with no thought of their surviving beyond the natural life of ephemeral pieces of magazine humor."

The parody of "Locksley Hall" is probably the best known, with its hero starting from a drinking bout to wander aside a bit and meditate:

Whether 'twas the sauce at dinner, or that glass of ginger  
beer,  
Or these strong cheroots, I know not, but I feel a little  
queer.

There is embarrassment of riches for quotation in his rippling verse. His audacity in parodies (of royalty and its prerogatives), is somewhat startling, but it was all in fun, and seems to have caused royal smiles instead of frowns. One of the milder examples of *lèse majesté* is a ludicrous eulogy of "Doudeney Brothers," apparently tailors who may have advertised "By Special Appointment to H. R. H. . . ." in which these lines appear:

Hark, from Windsor's royal palace, what sweet voice  
enchants the ear?  
"Goodness, what a lovely waistcoat! O, who made it,  
Albert dear?  
'Tis the very prettiest pattern! You must get a dozen  
others!"  
And the Prince, in rapture, answers—"Tis the work of  
Doudeney Brothers!"

The desire of numerous poets for the honor of appointment as Laureate brought forth "The Laureate's Tournay," where the claimants to the honor are pictured as knights tilting for the prize. The poem is divided into "Fytte" the First and Second. Alas, there was

But one poor butt of Xeres, and a thousand rogues to drink!  
And if it flowed with wine or beer, 'tis easy to be seen,  
That dry within the hour would be the well of Hippocrene!

Sir Frederick Pollock (1845—), whose name is far more familiar to every modern law student than is Martin's, also indulged in the writing of parodies. He has been called the "unsurpassed Parodist," and to the reader who is familiar with Tennyson, Browning, Swinburne and the old ballad-makers, his "Leading Cases Done Into English—and Other Diversions" are a joyous treat. In "Coggs vs. Bernard" appears a fine example of Tennysonian blank verse. Chief Justice Holt is supposed to be delivering judgment. The opening lines, so far as words go, might be an excerpt from the "Mort d'Arthur":

Brethren, ye see this cause, and the land's need  
Laid on this bench this day, whereof our speech  
Should be the sentence of no darkling tongue,  
Seeing we are set amidst this strife of men  
As warders of a vast and windy shore  
Stormed on with surf and shock of violent seas,  
To kindle some sure beacon for a sign  
Shining henceforth to seaward, such a light  
Men look for from the face of most high law,  
Ardent with prophecy and illuminate  
With fire of constellated precedents  
Most Royal in bounty; wherefore in this case,  
Sirs, I have much considered, questioning  
Our books within myself, not as the fool  
That lightly utters fruits of a light mind,  
But weighing, as this declaration is,  
How it shall lie; . . .

Much space has been devoted above to the British writers, without pretending to exhaust that bounteous domain, still leaving the great American field untouched. Men of mark in the legal profession have been and are skilled not only in the technicalities of the law and in the broad underlying philosophy of jurisprudence, but in literature, languages, history and the arts and sciences in general. Many of the intellectual giants of the bar have concentrated their literary activities on the writing of books on the law, or historical treatises. Some of the most elegant examples of pure literature may be found in the written decisions of certain Judges, such as those of Mr. Justice Holmes of the United States Supreme Court, and of Benjamin N. Cardozo, Chief Judge of the Court of Appeals of New York. The outstanding members of the profession see more in mankind than a great collection of plaintiffs and defendants!

A friend said of Rufus Choate (1799-1859), "he cared nothing for money, little, too little perhaps, for society, beyond his own immediate friends; less than any able or brilliant man I ever knew, or almost ever heard of, for fame—but study, books, intellectual labor and achievements, poetry, truth, these were the controlling elements of his life." He left some fragments of translations from Thucydides and Tacitus, which were prepared solely as a private exercise and for a personal pleasure and advantage. Surely an engrossing light diversion—to translate Thucydides' history of the wars of the Peloponnesians and Athenians!

William Wirt (1772-1834), Attorney General of the United States, who participated in the prosecution of Aaron Burr, early desired to shine in the art of letters—"for he has left it of record that he had prepared his first legal paper (a constitution of a moot court organized by himself), written his first essay in polite letters (a roguish quip aimed at

a tyrannical usher), and wooed and fairly won his first love (they were to have been married in the early Fall), before he had attained the age of eleven years."

He wrote a "Life of Patrick Henry," but, in addition to scattered essays and similar pieces, he was also the author of "The Letters of a British Spy." They purported to be letters containing observations on life and society in Virginia, written by an English traveller, and were so artfully framed that many persons long persisted in the belief that they were bona fide—some even going so far as to identify the author! The papers had a great vogue, were published in book form and went through several editions. It did not detract from the interest and amusement with which they were received that they contained scarcely veiled personal allusions, and gave deadly offense to some of the more pompous of Wirt's contemporaries!

It would extend this disquisition beyond all bounds to refer in any detail to the vast output of literary work of the members of the American Bar. One is staggered by mere contemplation of the number of members of that august body. For example—it is intended as no slight upon the Adams family that its members are not herein discussed—it is thought that such discussion would be somewhat tautological! Robert Ingersoll may be mentioned as one of our American lawyers who, as a man of letters, definitely stamped his impression on the nineteenth century.

Several lawyers who have met with considerable success at the bar are now amongst the most widely known and approved writers of current fiction, notably Arthur Train and Clarence Buddington Kelland. They, and many like them, have found at least as much profit and enjoyment in their literary pursuits as in the law.

The law as a profession is so exacting that it is remarkable to observe the amount of other than purely informative writing which has been accomplished by its adherents. Wearied by the mere cataloging of her efforts to brighten the lives of the learned men referred to herein, now let us leave the Muse sleeping in the arms of the Law!

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#### United States Supreme Court Building

On November 19, 1931, it was announced that award had been made of the contract for the new building for the Supreme Court of the United States, at a contract price of \$8,383,000. While the award contemplates approximately three years for erection of the building, it is expected that the contractors will complete it before the end of that period.

The contract calls for an exterior of Vermont marble, and the use of Georgia marble for the four courtyards, while the interior will be mostly Alabama marble. There will be some foreign marble used in the court room. When completed, it will be one of the most imposing and stately structures in the whole Federal public building program. The foundation work has been completed.

## YUCATAN DIVORCES

Danger of Resorting to Yucatan Courts for Divorces Which Parties Cannot Secure in the State of Their Domicile in the United States—Rules Governing Recognition of Foreign Divorces under the Full Faith and Credit Clause and the Principle of Comity—Persons Contemplating Step Should First Obtain Competent Legal Advice

BY ROBERT B. CARTWRIGHT  
*Member of the Albuquerque, N. M. Bar*

WITHIN the last few years the subject of divorce has become one of increasing importance to the members of the legal profession. Many states have enacted legislation providing for a shorter period of residence, added new grounds, and in general made it easier to dissolve the bonds of matrimony. Some of the states of Mexico have provided for the securing of divorces by consent of the parties, without any specified period of residence. In Yucatan, Mexico, a case based on the ground of mutual consent can be attended to by power-of-attorney, without the personal appearance of the interested parties. In non-consent cases the petitioner must appear before the court personally. Whether contested or uncontested, the law makes no provision for residence prior to the beginning of the proceeding.

Many persons in the United States, because of inability to secure a divorce in the state of their domicile, are resorting to the courts of Mexico for relief. A Yucatan divorce is very tempting to these parties, for several reasons. There is no inconvenience; it may be secured with ease, and there is practically no delay. However, in most cases all these inviting circumstances are entirely offset by the fact that the divorce secured is invalid and probably will not be recognized by any state in the United States.

Recognition of a divorce decree rendered by a court of a foreign country is based upon comity, the full faith and credit clause of the Federal Constitution having no application. *Bonner v. Reandrew*, 214 N. W. 536; *Boissevain v. Boissevain*, 220 N. Y. S. 579.

It is safe to say that no state in the United States would recognize, under the principles of comity, a decree rendered by a court of another country where that court did not have jurisdiction. A state does not have to recognize a divorce decree of a sister state, even in view of the full faith and credit clause of the Federal Constitution where it was rendered without jurisdiction, and the existence of jurisdiction is always a proper subject of inquiry. *Haddock v. Haddock*, 201 U. S. 562; *Bell v. Bell*, 181 U. S. 175; *Andrews v. Andrews*, 188 U. S. 14; *DeBouchel v. Candler* (D. C. Ga.) 296 Fed. 482; *In Re Bennett's Estate*, 238 N. Y. S. 723.

Judge Sibley, in *DeBouchel v. Candler*, supra, in passing upon the validity of a Nevada divorce, restated the rules laid down by the United States Supreme Court and other courts in decided cases,

relative to the recognition of foreign divorces under the full faith and credit clause, and under the principles of comity. Those rules are as follows:

"1. A decree of divorce, void under the laws of the state where granted, is void everywhere, and is subject to collateral attack.

"2. The state of the domicile of the married pair at the time of their separation is the 'matrimonial domicile.' That state has first and full jurisdiction over the question of divorce and its incidents. A decree there rendered, on regular service therein of the defendant, fixes the personal rights and matrimonial status of both parties, and must have full faith and credit in all other states.

"3. Should one party depart from the state of the matrimonial domicile, whether it be the party at fault or not, the jurisdiction of that state to decree a divorce and fix the status of the party remaining there is unaffected, though the only service be substituted service, and such a decree regularly granted there is entitled to full faith and credit in all other states.

"4. Should both parties permanently remove from the state of the matrimonial domicile, that domicile perishes, and the jurisdiction peculiar thereto lapses. It accompanies neither spouse. The state of the matrimonial domicile no longer has any concern or jurisdiction in the premises. No other state succeeds to its rights.

"5. If either spouse removes to another state *animo manendi*, and acquires there a domicile, a jurisdiction arises in such state, based on its interest in, and right to fix, the matrimonial status of its new inhabitant, in virtue of which it may decree such status. After such length of residence as it may fix, and for such causes as it may allow, a divorce may be granted effective within such state; but, if made on substituted service, and perhaps when on personal service if in evasion of the laws of another state, it is not entitled to full faith and credit in other states, but will by comity be recognized, if not detrimental to their policy or interests.

"6. A state in which an applicant for divorce is a mere sojourner, and in which the other party is not domiciled, has no jurisdiction to grant a decree on substituted service, but is a mere meddler; and such a decree, even though authorized by its own laws, is not entitled to full faith and credit elsewhere as a matter of right, and should not be recognized by comity because directly tending to

overthrow the power of every state to deal with the matrimonial status of its own citizens.

"7. The actual domicile of one party or the other in the state in which a decree of divorce is granted being thus essential to the jurisdiction to make it, whether such domicile in fact exists may be collaterally inquired into when the decree is sought to be used in another state. If it clearly appears that such domicile was lacking, the decree will be treated as a nullity, and the status of the parties unaffected thereby.

"8. The finding of the fact of domicile by the court making the decree raises a presumption that it existed. After a lapse of time, and especially after the rights of other persons have intervened on the faith of the decree, the clearest and most satisfactory proof should be required to overcome the presumption. In other circumstances less convincing evidence may suffice."

I do not wish to be understood as saying that all divorces secured by Americans in Yucatan are invalid. Without doubt any state in the Union would recognize a divorce granted in Yucatan to persons domiciled there. But when Americans authorize Yucatan attorneys to secure their divorce, or one or both of the parties go there with no intent of changing their domicile but solely for the purpose of obtaining a divorce, then I do say that such decree is entitled to no recognition.

Marriage is the foundation of the family and of society. When contracting parties enter into the married state, a new relation is created, the rights, duties, and obligations of which rest upon the general laws of the state. *Adams v. Palmer*, 51 Me. 481; *Maynard v. Hill*, 125 U. S. 190. Each state has the undoubted right to regulate the subject of marriage and divorce within its borders, fix the matrimonial status of its citizens, and defend that right against encroachment. *Maynard v. Hill*, supra; *Andrews v. Andrews*, 188 U. S. 14; *DeBouchel v. Candler*, supra; *Ditson v. Ditson*, 4 R. I. 87; *In Re Bennett's Estate*, 238 N. Y. S. 723.

The contract of marriage is for life. It is not within the right or power of the contracting parties to terminate it, except in the manner provided by the sovereign. *Maynard v. Hill*, supra. If the contracting parties authorize attorneys in Yucatan to secure a divorce for them, and such a divorce is secured, are they not doing that which the laws of the state in which they are domiciled prohibit? New York has answered the question in the affirmative. In *Alzmann v. Maher*, 246 N. Y. S. 60, the court said:

"Papers were forwarded by him and his wife to lawyers who put through the proceeding. Petitioner claims that under the laws of Mexico residence is not necessary. Perhaps it is not; but the trouble with this argument is that neither Mexico nor any state in Mexico ever had jurisdiction of the parties or the subject-matter, and could not obtain jurisdiction by legislation without consent of the state where law is allowed to operate. . . . Since the petitioner and his wife, residents of this state, were married and continue to reside here, they are subject to all of the laws of this state. Therefore, in procuring the Mexican decree of divorce, they violated the law, procedure, and public policy of the state, and the decree of divorce they there obtained is invalid."

If the contracting parties were to go from the state of their domicile to Yucatan, Mexico, and obtain a decree of divorce by consent, the same result must necessarily follow, unless they intend to make that place their new domicile. Jurisdiction depends

upon domicile of one or both of the contracting parties. *Andrews v. Andrews*, supra; *Haddock v. Haddock*, supra; *DeBouchel v. Candler*, supra; *Lister v. Lister* (N. J. Eq.) 97 Atl. 170; *Hollingshead* (N. J. Eq.) 110 Atl. 19; *Fischer v. Fischer*, 254 N. Y. 463, 173 N. E. 680; *In Re Bennett's Estate*, 238 N. Y. S. 723; *Alzmann v. Maher*, 246 N. Y. S. 60; *Bonner v. Reandrew* (Ia.) 214 N. W. 536.

In *Andrews v. Andrews*, supra, the Supreme Court of the United States held that Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and would prohibit them from perpetrating a fraud upon its laws by temporarily sojourning in South Dakota, and while there securing a decree of divorce.

In *Lister v. Lister*, supra, the New Jersey court refused to recognize a Nevada decree secured while the contracting parties were sojourning in that state.

Although the above cases clearly indicate that domicile is necessary to give a court jurisdiction, yet in those cases the legislatures of the states where the divorces were secured did not attempt to give the courts jurisdiction without domicile. A certain residence for a specified period of time was required. Residence is construed by the courts to mean domicile. *Bechtel v. Bechtel*, 101 Minn. 511, 112 N. W. 833, 12 L. R. A. (NS) 1100, affirmed 188 U. S. 14; *Cohen v. Cohen* (Del.) 84 Atl. 122; *Smith v. Smith*, 10 N. D. 219, 86 N. W. 721; 19 C. J. 26. However, in *Rollins v. Rollins* (D. C. App.) 53 Fed. (2d) 917, decided November 2, 1931, the Court of Appeals of the District of Columbia, in passing upon the question as to whether a woman domiciled in West Virginia but residing in Washington was entitled to maintain a suit for divorce, held that notwithstanding the District statute does not require any specific period of residence, domicile was necessary to give the court jurisdiction. The American Law Institute, in the Restatement of Conflict of Laws, par. 117, states:

"A state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state."

Any other conclusion would nullify all control which a state has over the marriage relation.

If one of the parties went to Yucatan for the sole purpose of securing a divorce, no domicile would be created thereby, and for that reason the Yucatan court would not have jurisdiction and the decree would be invalid and would receive no recognition. The Supreme Court of Iowa, in *Bonner v. Reandrew*, 214 N. W. 536, passed directly upon this question and held the Yucatan divorce secured by the husband entitled to no recognition.

On the other hand, if one of the parties went to Yucatan with an *animo manendi* and secured a divorce, then that decree would be recognized by comity under proposition five stated by Judge Sibley, if not detrimental to the policy or interests of the state requested to recognize it. Frequently this leads to an unfortunate result in that a person might be divorced in one state and married in another. The American Law Institute, in its Restatement of Conflict of Laws, par. 118, in order to avoid such a result and also to prevent as far as possible fraudulent divorces, sets forth the following principles:

"A state cannot exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled out-

side the state, unless the spouse who is not domiciled in the state (a) has permitted the other spouse to acquire a separate home; or (b) by his misconduct has ceased to have the right to object to the acquisition of such separate home; or (c) is personally subject to the jurisdiction of the state which grants the divorce."

Thus it will be seen that the securing of a

divorce in a foreign jurisdiction is apt to result in serious legal consequences and that persons contemplating resort to a foreign state to secure a divorce should not so do without first obtaining competent legal advice.

## REPORT ON CRIMINAL STATISTICS\*

Recommendations of the National Commission on Law Observance and Enforcement—  
Practical Aspects of the Development of a National Plan for Crime Statistics—Is  
Absolute Centralization Necessary to Secure Adequate Report?—Commission's  
Work Has Contributed Materially to Our Knowledge and Undoubtedly  
Helped Through the Publicity Received in Preparing the  
Ground for Reform

By THORSTEN SELLIN

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OUR national crime problem has never been more in need of solution than it is today. The "criminal physiognomy" of the United States, however, is hidden even to those who most intelligently search for it, and who see it only in its blurred and distorted outlines. It is paradoxical, to say the least, that a country which seems to be one of the most lawless in the world should take so little interest in criminal statistics, which are such an essential pre-requisite to good public administration. It would be different were we explorers in an unknown country, but in this field numerous nations have broken the path. France has for over a century published national crime statistics, and there are few foreign nations today which cannot show such statistics for at least the last two decades. Many of them have, in fact, been compiling them for half a century or more. By contrast, in the United States annual national crime statistics are the product of the last six or seven years and are of much too narrow a nature to meet even the superficial needs of the scholar or the administrator.

When the announcement was made that the National Commission on Law Observance and Enforcement was to take up this question, many persons hoped that the belated interest in criminal statistics in this country would receive both impetus and guidance. They awaited the Commission's report with keen anticipation. This report, *Report on Criminal Statistics* (No. 3, April 1, 1931) was finally issued by the Commission. After the division of opinion which manifested itself in the preceding report on Prohibition, it was interesting to find complete unanimity in its recommendations.

The report consists of three distinct parts: the introduction, or the report proper, signed by all the Commissioners (pp. 1-18); "A Survey of Criminal Statistics in the United States" by Professor Sam Bass Warner (pp. 19-147); and "A Critique of Fed-

eral Criminal Statistics" by Morris Ploscowe, Esq. (pp. 149-205). The report proper opens with a discussion of five guiding principles underlying the establishment of a national system of criminal statistics. It is claimed that such statistics must be gathered from central statistical bureaus in each jurisdiction, one in each state and one in the Federal system. To these bureaus local reporting officials should submit transcripts of the statistical information they possess, such information to be correlated and tabulated by the central bureaus, which should, in turn, report all or some of the resulting tabulations to a national super-bureau, there to be co-ordinated, analyzed, and published in the form of a national report. It is stated that no bureau engaged in the administration of criminal law should compile and publish such statistics, the assumption being that the temptation to make an impressive showing might vitiate the results. It is finally suggested that a *comprehensive plan for national statistics* should exist, and that all activity in the future aiming at the creation or the revision of criminal statistics be taken with reference to that plan.

The Commissioners proceed to discuss some of the difficulties in the way of realizing these proposals. The United States, it is said, differs from the countries of continental Europe "in which criminal and penal statistics are well developed" and where "there is a highly centralized administration for the whole country, which makes the task of gathering, compiling, and publishing adequate statistics relatively simple." In the United States, on the other hand, the variations in law and procedure among the states and the difficulty of securing state cooperation with the Federal Government are mentioned as handicaps. It is suggested that Congress must authorize some Federal agency to receive reports<sup>1</sup> and that a uniform law acceptable to the

\*This is No. 3 of the Reports of the National Commission on Law Observance and Enforcement.

1. On March 4, 1931, Senate Bill 1812 became law. It provided "That the Director of the Census be, and hereby is, authorized to compile and publish annually statistics relating to crime and to the defective, dependent, and delinquent classes."

states must be drafted to insure uniformity in the collection and the tabulation of the needed information.

The Commissioners then refer to the studies by Messrs. Warner and Ploscowe as describing "the present situation" as to state, municipal, and Federal statistics, a statement which is in the same paragraph modified by another which indicates that Mr. Warner's survey does not cover developments since 1929, a situation which causes serious discrepancies between some of the statements made by the Commissioners and those contained in Mr. Warner's study.

In a section on plans for a system of nationwide statistics, the Commissioners review the history of such statistics in this country. The decennial census of prisoners taken by the Bureau of the Census since 1850 is particularly mentioned, as well as the annual reports of prisoners in Federal and state penal institutions, which that Bureau began to issue in 1926. The recent work of the Children's Bureau in gathering juvenile court statistics is briefly cited, but relatively great attention is paid to the work of the International Association of Chiefs of Police, which, in 1929, adopted a uniform plan for centralizing reporting of statistics of crimes known to the police. This work, privately undertaken at first, was in 1930 taken over by the United States Department of Justice under an Act which permitted the Bureau of Investigation to gather "other crime records" in addition to records of identification. It is noted that in December, 1930, 1,002 cities, including 83 per cent of the cities with more than 125,000 population, were reporting "crimes known" on a uniform basis.

This section is followed by a discussion of the proposed plan for national crime statistics. The division of labor among three Federal bureaus, as mentioned above, is held by the Commission to be undesirable. We are warned that statistics must be gathered with caution, that the Department of Justice has laid itself open to grave criticism in issuing police statistics without proper interpretation and that the statistics of crimes known are so questionable that they should not in their present state be published by the Federal Government.

The recommendations of the Commissioners, which conclude their report, may be paraphrased as follows:

1. Statistics pertaining to the enforcement of Federal law should be centralized in a bureau in the Department of Justice.

2. A uniform law "with respect to gathering and transmitting of state statistics of criminal justice, so far as required for general national purposes, should be drafted," preferably by the National Conference of Commissioners on Uniform State Laws, and its adoption by state legislatures should be urged. This law, as passed, would probably in many states contain additional provisions, but the significant thing about it is that it would provide for uniformity in so far as those items were concerned in which, for the purposes of a national report, some Federal agency is interested.

3. "No further activities as to general criminal statistics should be undertaken by the Federal Government until the *ultimate plan* [my italics] is

settled, and whatever further is attempted should be done with reference to that plan."

4. When such a plan has been created and the uniform state law incorporating its essentials has been adopted to such an extent that a "sound foundation" exists for national statistics, the task of gathering, compiling, analyzing and publishing them should be entrusted to the Bureau of the Census.

5. Until then, the division of labor now existing among the Bureau of Investigation of the Department of Justice, the Children's Bureau, and the Bureau of the Census should be maintained, each bureau attempting, however, to improve its work and to avoid the publication of partial or misleading statistics.

To summarize, we need a comprehensive plan for national crime statistics, a uniform law to make this plan work, no great changes in present national crime statistics until this plan has been drafted and embodied in the legislation of a great many states, and, finally, the establishment of a central national bureau of crime statistics in the Bureau of the Census.

To claim that these recommendations grew out of the Commission's work would hardly be possible. For the last couple of decades, at any rate, they have been reiterated by numerous criminologists and statisticians. Some of them were taken up by Robinson in 1910. They were discussed in almost the same terms as those of the Commission in the report made in 1911 to the American Prison Association by the chairman of its committee on Criminal Law and Statistics, and they were the subject of numerous reports and papers addressed since then to the American Institute of Criminal Law and Criminology. In other words, the recommendations of the Commission make no important contribution, but are re-statements of suggestions already familiar to all those who have had serious contact with the question.

There are, it seems to me a number of indications in the report itself, and in the accompanying survey, that the practical aspects of the development of a national system of criminal statistics have not been clearly visualized. It is assumed, for instance, that no national report can be achieved unless absolute centralization is secured. This is a debatable question. Some of the foreign reports, to which attention is occasionally called in the documents of the Commission, have grown out of the cooperation between two or more central agencies. There is no reason why such cooperation might not be established among the Department of Justice, the Children's Bureau, and the Bureau of the Census, thereby achieving uniformity in reporting and analysis and, at least, centralized publication. I incline toward the Commission's view at least to the extent that one Federal bureau should be entrusted with the publication of the national report, but it would be unwise to insist that all of the steps toward the completion of that report must, in order to be reliable, be taken by that bureau alone.

It would be equally impossible to insist, as the Commissioners do, that the Bureau of the Census is the only logical organization to compile and publish the national report. Undoubtedly, the arguments advanced are powerful, but the examples in

their support chosen from other countries are extremely one-sided. Canada's, England's, Australia's and New Zealand's reliance on the central statistical bureau most nearly corresponding to our Bureau of the Census is mentioned, but we find no reference to the fact that it is the Ministry of Justice which in France and in Italy compiles the national crime statistics, and that in Germany the Ministry of Justice cooperates with the statistical bureau in that work. Ministries of Justice have also in many other countries been given charge of such statistics. So far as the United States is concerned, it is undoubtedly correct to state that the Census Bureau is the oldest national agency in this field. It also operates on the basis of a more satisfactory law than does the Department of Justice. In spite of the conflicting statements in the Commission's publication, however, national statistics are being gathered by the Department of Justice, and the Children's Bureau today, and the question for the future is not that of the transfer of these statistics to the Census Bureau, but that of the establishment of such friendly cooperation among these agencies that all the essential requirements of good national statistics may be secured. Complete centralization would, no doubt, simplify the problem, but we must face realities. National crime statistics cannot, unfortunately, be established *de novo*. They are already with us in the forms mentioned, and more comprehensive plans in the future have to take this fact into consideration.

The report criticizes the Department of Justice for publishing monthly reports of crime known to the police without proper interpretation, thereby leaving to unqualified readers the opportunity to abuse the data. For this reason the report suggests that such statistics should not be published for the present, since erroneous or partial statistics should not be issued with the Government's sanction. I accept wholeheartedly the statement that no statistics should be issued by any official agency, state or Federal, without full explanations of their limitations. I doubt, however, that such explanations would eliminate the improper use of these statistics. Carefully analyzed statistics in other fields are constantly being misused unintentionally or maliciously by people who must find support for hide-bound notions or bias. The best of criminal statistics would not escape this fate. Nor can I subscribe to the claim that imperfect statistics, even when carefully analyzed, should not be published by the Government. Even the British Home Office, to whose admirable policies frequent appeals are made in the Commission's document, has, in spite of their realization of the defects of their police statistics, continued to publish them since 1857, albeit with solemn warnings. Could we do less?

A study of the report as a whole gives one the feeling that the Commissioners passed up an opportunity to make a real contribution to the cause they so warmly embraced. They stressed the basic need of a national plan, yet failed to propose one. Perhaps they realized the difficulties involved. It took half a century to bring our national vital statistics to their present far from perfect state. It may take as long before we have reached the same level in criminal statistics. The ground that we have hitherto gained, however, is too precious to yield. We must build on the statistics in existence. The

"national plan" will have to grow out of practical experience actually gained in gathering criminal statistics.

I can hardly criticize the Commissioners, therefore, for not achieving the impossible. They might, however, have prepared a complete plan, whether ultimate or not, and given specific suggestions of what practical steps should be taken to achieve its realization. They might even have drafted a uniform law, not with the belief that either plan or law would be models of their kind and ready for immediate adoption, but in order to furnish a point of departure and a subject for discussion among those who are now faced with the task of devising a more nearly comprehensive system of national criminal statistics, and who look in vain for guidance in the Commission's report.

The report on criminal statistics is, in spite of what has been said above, of great interest. It is relatively up-to-date. It brings within two covers much scattered information. It contributes materially to our knowledge of the status of Federal statistics and undoubtedly has helped, by the publicity it has received, in preparing the ground for reform. Considering, however, the opportunities for constructive work which the Commissioners might have utilized, these achievements seem rather meager.

#### Lawyers and Probation Technique

THE lack of information on the part of lawyers regarding probation, and the reasons therefor, is the subject of an article by Prof. Justin Miller, Chairman of the American Bar Association's Section on Criminal Law, in the 1931 Year Book of the National Probation Association. This lack of information, he says, is due to two things: "First, the pride that many lawyers take in the fact that they know nothing about criminal law or have never been in a criminal court, or if so, only at rare intervals. And secondly, the lack of proper training along this line by law schools.

"It is entirely possible for a lawyer to go through an arts college, get a Bachelor's or Master's degree or become a Doctor of Philosophy, and then attend law school and yet never hear a word from his instructors about probation. Criminal law is given usually as a required subject in the first year. It covers very scantily what is called substantive criminal law. Sometimes it touches slightly the subject of criminal procedure. Occasionally mention is made of problems of administration, but as to the new techniques, one of which is probation, usually the college and law school courses speak not at all.

"Frequently the instructor is not sympathetic towards the course, or is a person who has had the course assigned to him because no one else on the faculty wanted it. Sometimes he advises his students to forget the study of criminal law when they have finished with it. Students, so trained, go out into practice and represent clients in the organization of corporations: in the making of contracts; in the running of railroads,—fields in which the lawyers receive their most substantial fees, together with the greatest respect from their colleagues and from the public. These lawyers have no opportunity of coming into contact with such subjects as probation."

# JURISPRUDENCE: SCIENCE OR SUPERSTITION\*

BY HON. CUTHBERT W. POUND  
Chief Judge, New York Court of Appeals

WHEN I was a law student in my brother's office in the '80's we did not disturb ourselves with the study of jurisprudence,—historical, sociological, philosophical or comparative. We had no thought of making the law follow the methods of the physical sciences. We knew that scientists by studying the reactions of white mice, guinea pigs and rabbits to sundry substances and treatments worked out definite results in chemistry, medicine and hygiene, but it did not occur to us that lawsuits might be determined by the application of such methods to human beings or by the study of equations or non-Euclidian geometry. A lawsuit was like a game in which skill yields to the element of chance. The result was proverbially uncertain. The rule of law was, however, deemed certain. Its force was in the application of it. It might be the rule of reason or a reasonable rule, or it might be based on the arbitrary decision of an eighteenth century judge, holding his position at the pleasure of the crown, in a world managed largely for the benefit of landlords, husbands and masters. Ours not to reason why but to find a case in point. The digests and text-books were sedulously thumbed with that end in view. That done, enough that the papers were properly folioed, subscribed and endorsed; the rules of evidence strictly enforced; the exceptions properly noted on the record; the jury moved by eloquence or cunning appeals to sympathy or prejudice. Law addressed itself not to laymen but to courts and lawyers.

The worship of precedent, the recognition of *stare decisis* as an absolute dogma, went on with scarcely a voice of dissent or protest. The decision may have been wrong but we were never to doubt it. It might be beside the point. Still we would cite it, especially if it were well-known. In Herbert's "More Misleading Cases" Mr. Swoot, K. C. says: "Milord, in the case of Rylands v. Fletcher"—and the judge says: "Dear, dear! *Must* we have Rylands v. Fletcher?" (Cowfat v. Wheedle, pp. 73, 77). Sometimes it was difficult for the bar to determine what the court really meant. The court not infrequently found trouble in understanding its own decisions. "Too often," says the learned and observing Dr. Goodhart, "the cautious judge will include in his opinion facts which are not essential to his judgment, leaving it for future generations to determine whether or not these facts constitute part of the *ratio decidendi*." (Essays on Jurisprudence and the Common Law, p. 15). Then up would pop the court with something like this saving clause: "It is also suggested that our opinion has raised apprehension as to its effect as a precedent upon railroad leases and traffic agreements, of which there are said to be many now in force all over the state. It was not our intention to decide any case but the one before us, which simply involved the standing of the plaintiff to make the application in

question, and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance. *The failure to read the opinions of the courts with this fact in mind gives rise to much fruitless litigation.*" (Vann, J. in Colonial City, T. Co. v. Kingston R. R. Co., 154 N. Y. 493, at p. 495.)

A "bramble bush" of confusion and contradiction resulted. Only last year a prominent English judge, writing on the liability of husband to wife for personal injuries sustained by her through his fault before marriage, said: "I desire to add a few words only to this somewhat full judgment. I have referred to many decisions. I have, for the purpose of the case, read many more. I have considered with care the intricate provisions of the Married Women's Property Act, 1882. At every point of the research, on every aspect of the case, I find *nothing but confusion, obscurity and inconsistency*. I find privileges given to a wife which are wholly denied to a husband, and I find that upon the husband there has fallen one injustice after another. I hope that the day is not far distant when the vital and far-reaching relationship of husband and wife will receive the attention of Parliament. When that day comes I trust that the present features of injustice will be removed, that the existing obscurities will be made clear, and that the great institution of marriage will gain a new dignity and a new strength through a wise and beneficent amendment of the law." (McCardie, J. in Gottliffe v. Edelston, (1930) 2 K.B. 378, at pp. 293-4.) The same might well be said as to the law of domestic relations in this state, with special regard to the annulment of marriages for "fraud" where the defendant, as weary of the marriage yoke as his spouse, does not deny the so-called "fraud" and complacently submits to a decree by default on trivial or irrelevant grounds if the plaintiff can move an open-minded judge to grant it under an unwarranted extension of the rule of the di Lorenzo case. (174 N. Y. 467.)

But no one cared to question the principle that a decision once made should be followed if it could not be "distinguished." Much virtue was found in that comfortable word. "Do you distinguish, Mr. Swoot, between a destructive mammal and a destructive gasteropod?" says Mr. Justice Wool in Cowfat v. Wheedle, *supra*. A notable member of the Rochester bar once pointed out that two seemingly antagonistic decisions of the Court of Appeals could be "distinguished" by the circumstance that the names of the parties were different.

Sometimes, as in Lawrence v. Fox, the New York courts cast off the ancient English rule, without perhaps fully comprehending what the English

\*Address delivered before the Harvard Law School Association of Western New York, at the home of Justice Sears, June, 1931.

rule was, but rarely were new ventures made. Later in the history of the court, a rule once stated sometimes has been reconsidered and restated as in the cases involving the sale of goods in bulk, workmen's compensation, hours of labor for women, hours of labor and prevailing rate of wages for workmen in contracts with municipalities, and liability of municipal corporations in tort.

The practice of law in New York has not changed greatly since 1880. The law schools and the law reviews, viewing comprehensively in a vast library of reported cases drawn together from the white cliffs of Albion to Ceylon's spicy isle, from Arizona to Wisconsin, in a new outside environment of international trade and travel, radios, aeronautics, automobiles, installment sales and liability insurance, have developed a new cult which exhorts and sometimes influences the courts to cast off the iron bands of precedent as a senseless impediment to free action and to make a fresh start. We are referred to the work of Holmes and Cardozo, my kinsman Dean Pound, Jerome Frank, Llewellyn and Oliphant, rather than the *nisi prius* opinions of cross and capricious British judges of another time and place for a proper adjustment of the judicial function to the paradoxes of legal science. Although we are not so closely tied to precedent today as formerly, I venture to say that one well-considered decision in point made by a respected court when cited on a brief will count for more in winning a decision than all the students' notes or the scholars' restatements of the law.

Law based on a traditionary line of decisions has become an impracticable and antiquated method of doing justice; a ponderous and uncertain mechanism from which the flour of decision pours slowly after the grist has been emptied into its hungry jaws. From trial term to Appellate Division and Court of Appeals, with possibly one or more new trials on the way, and potentially, at least, a review by the United States Supreme Court if a federal question is involved, the case goes on to command, in the end perhaps, a statement of the law in a brilliant and erudite opinion of an able judge which will serve as a text for further distinguishing, enlargement or restriction of principle, or possibly, for new statutes which in turn will call for judicial interpretations and applications. The best test of the practicability of our system is that the people have not arisen in their might indignantly to demand some better method than a long and tedious law suit for determining whether, for example, the proper remedy for an injured workman is to be found in the U. S. Employers' Liability Act or in the state Workmen's Compensation Law. It is a small satisfaction to the victim of industrial misfortune or to his widow and orphaned children to know that although the lawyer has chosen the wrong remedy, the client has become the hero of a leading case, with the opinion in the case books in all the law schools.

It is said that they do things better in England. Perhaps that is true, but the cost of litigation there, as well as here, is excessive, especially for the defeated party. In *Croker v. Croker* (252 N. Y. 24) it appeared that the costs taxed against the unsuccessful party in the High Court of Justice, Irish Free State, amounted in American currency to nearly \$16,000. The case was of no rare import. In order

to simplify procedure in court resort is had to manifold interlocutory proceedings before a Master. The White Book, like the annotated Civil Practice Act, becomes corpulent and anaemic with the years. The unification of the English courts has doubtless improved conditions which prevailed in the days of *Jarndyce v. Jarndyce*, but according to their own critics much remains to make the law simple, cheap and certain. Mr. Mullens in his recent book "In Quest of Justice" suggests as a remedy that the judicial functions of the House of Lords be recast by making the Court of Appeal, reinforced by some of the Law Lords, the final appellate tribunal, and by employing the energies of the other Law Lords thus set free in (1) supervising the gradual and progressive codification of our judge-made law; (2) deciding which future decisions of the judges or of the new Court of Appeal should be accepted as authoritative; (3) settling doubtful points of law which are not yet actually in issue, but which are likely to generate expensive and dilatory litigation; (4) fulfilling the unperformed duties of the annual council of judges; (5) supervising the drafting of parliamentary bills.

This indeed is a heavy, if not impossible program to impose on any judicial tribunal. In this state the Court of Appeals, with two exceptions,—murder in the first degree and cases in equity where the Appellate Division has reversed and made new findings of fact,—confines itself to the review of questions of law on appeals from final orders or judgments or to questions certified to it by the Appellate Division. It is no longer over-technical. It is disposed to obey the spirit as well as the letter of the mandate to disregard unsubstantial error. The unanimous decisions of the Appellate Division, unfortunately perhaps, are no longer final on the question whether there is evidence to sustain the verdict or decision. Now that the old provision has been taken from the law some lawyers are discovering it for the first time and are citing cases holding that the court will not read the evidence to see if it is sufficient in law to sustain the unanimous affirmation.

The functions of the court of last resort as a body "with supreme power to authoritatively declare (The split infinitive is Martin, J.'s not mine) and settle the law uniformly throughout the state." . . . "not that individual suitors might secure their rights, but that the law should be uniformly settled" (*Reed v. McCord*, 160 N. Y. 330), have been greatly modified in practice and by constitutional amendment so that practically all substantial questions of law raised by an exception on the trial and decided in the court below may be brought before us for review. Lawyers delight in taking their cases as far as possible. If there is a higher court they yearn to enter its portals and seek to evade the angel of constitutional or statutory limitation which guards the entrance with drawn sword. Any modification of a judgment, whether it affects the rights of the appellant or not, and whether it is favorable or adverse to him, permits an appeal as a matter of right and appeals are allowed "in the interests of substantial justice."

Might the court, restored to its once narrow but important duty to harmonize conflicting decisions of the Appellate Divisions and to decide great public questions, be empowered, without plac-

ing too heavy a burden of work on it, to act in the capacity of a ministry of justice or, with certain additions from bench and bar, as a judicial council, centralizing the machinery for the distribution of judges for trial work and formulating restatements of the law for legislative action? Or must individualistic judges continue to run their own assignments at will as to hours of labor and length of terms? Must rules of law continue to be stated by the courts only as they arise in litigation between private individuals in which the state has no interest and be so stated in accordance with precedent, if precedent exists and may not be avoided?

The American Law Institute labors to make a restatement of the law, relying upon moral suasion for the adoption of its work by the courts. Its labor has been provocative of argument and helpful to the courts but in New York its proposed rules have been rejected in several instances because we had a conflicting rule. If material change is called for, it should be applied to controversies arising in the future rather than in the past, otherwise no man knows the law,—not the court itself,—until the decision is made and we must all grope in the darkness to find our rights and duties.

The court knows, or should know, better than any other body the weakness or injustice of law as established by judicial decisions. If it must unwillingly follow precedent, why should it not prepare and recommend corrective legislation to meet future cases? The court might settle doubtful points of law which are not yet actually in issue as is done in some states through the medium of advisory opinions or, as in this state in a measure, by declaratory judgments. Beveridge's "Life of Marshall" intimates that the great Chief Justice inspired controversies in constitutional cases in order that they might be brought before his court safely to be decided under his federalistic régime. We frown at moot questions and refuse to decide them until we are compelled to do so.

These suggestions are no doubt contrary to the tradition of the judicial process in this state. Unification is limited when at least three courts of record,—Supreme, County and Surrogate's,—are left to function side by side. There is in fact nothing revolutionary about a unified judiciary under the supervision of a central administrative power; one trial and one appeal of right, as in criminal cases; and a supreme judicial council, with supervision over the codification or restatement of the law. The Court of Appeals might well be relieved of a great burden of relatively unimportant work and given augmented powers over the *corpus juris* and the administration of justice. The Appellate Divisions might be restored to the position of higher dignity and importance which was designed for them by the Constitution of 1894.

Can such changes be realized or approximated? They are not inevitable. They are not even popular with the bar. I can see a certain virtue in walking in peaceful error in the ancient ways rather than engaging in a struggle for the ideal system. "Reformation" is not always synonymous with "reform." The old methods rest on a solid basis. As long as law is, to most people, something to keep out of and away from, it is not probable that the bar will be active in placing limitations upon its own esoteric activities. Some day, perhaps, some Bentham or

Austin may arouse the people outside the bar associations to a movement to lessen the expense and the delay of litigation by radical and intelligent revision. Until then the bar will doubtless retain its characteristics of inertia, conservatism and lack of intellectual curiosity. The bench will, as usual, resist innovation and approach with dread any suggestion of cure, rather than mere palliation of symptoms which indicate weakened heart and lungs, myopia, loss of hearing and other ails of the body of administrative justice.

Meanwhile may the higher courts be relied on, although acting slowly and piecemeal and often with an alternate ebb and flow in the tide of progress, to do their best to adjust the law to life whenever it is possible under our system for them to do so?

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912 Of American Bar Association Journal, published monthly at Chicago, Illinois, for April 1, 1932.  
State of Illinois, } ss.  
County of Cook, }

Before me, a notary public in and for the State and county aforesaid, personally appeared Joseph R. Taylor, who, having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher: American Bar Association, William P. MacCracken, Jr., Secretary, 1140 N. Dearborn St., Chicago.

Editor-in-Chief: Edgar B. Tolman, 30 N. La Salle St., Chicago.

Managing Editor: Joseph R. Taylor, 1140 N. Dearborn St., Chicago.

Business Manager: Joseph R. Taylor, 1140 N. Dearborn St., Chicago.

2. That the owner is: American Bar Association, Guy A. Thompson, President, 705 Olive St., St. Louis, Missouri; William P. MacCracken, Jr., Secretary, 1140 N. Dearborn St., Chicago; John H. Voorhees, Treasurer, Bailey-Glidden Bldg., Sioux Falls, South Dakota.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none:

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustees or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

JOSEPH R. TAYLOR,  
Business Manager.

Sworn to and subscribed before me this 29th day of March, 1932.

HELEN MARY POWERS.  
(My commission expires Nov. 16, 1935.)

(Seal)

## Washington Letter

1266 National Press Building.

Washington, D. C., April 12, 1932.

### Limiting the Jurisdiction of District Courts of the United States

**P**RESIDENT HOOVER, in a message to Congress on February 29, on strengthening of procedure in the judicial system (S. Doc. 65), stated that he did not approve of the legislation proposed to abolish entirely the jurisdiction of the Federal courts based on diversity of citizenship, but he did recommend the consideration by Congress of a measure to modify this jurisdiction to a limited extent by providing that where a corporation, organized under the laws of one State, carries on business in another State it shall be treated as a citizen of the State wherein it carries on business as respects suits brought within that State between it and the residents thereof and arising out of the business carried on in such State.

Such a bill was introduced in the Senate and House of Representatives. It was transmitted by the Attorney General and is commonly known as the Attorney General's bill. (S. 937 and H. R. 10594.)

On March 14, 1932, the Senate Judiciary Committee appointed a sub-committee to consider S. 937, together with S. 939, introduced by Senator Norris, depriving District Courts of jurisdiction based on diversity of citizenship, and S. 3243, introduced by Senator Johnson, respecting the jurisdiction of the District Courts over suits relating to orders of state administrative boards. The sub-committee, composed of Senators Norris, Robinson and Ashurst, held a hearing on March 18 and 19, at which time a number of witnesses were heard. The hearing was printed under the heading "Limiting Jurisdiction of Federal Courts."

Hon. Paul Howland, chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association, appeared at the hearing and explained the attitude of the American Bar Association on legislation having for its purpose the limiting of the jurisdiction of the District Courts. He asked and obtained leave to file a brief on the subject.

Senator Norris, in referring to the Attorney General's bill, at the hearing, stated:

"My objection is first, that it does not go far enough; and, second, that it is fundamentally wrong to place a non-resident corporation on one basis and give a non-resident individual an advantage that you do not give the corporation. It seems to me the corporation and the individual ought to rest entirely upon the same basis."

In view of the above attitude of the Chairman, it is hardly probable that the Attorney General's bill will be favorably reported by the Senate Judiciary Committee. It will likely be Senator Norris' bill or no legislation.

A special meeting of the Senate Judiciary Committee was held on April 8, after which Senator Norris presented Senate Report No. 530 favorably reporting S. 939 and recommending the passage of the bill.

In calling attention to the real objections and the real objectors to the proposed legislation, Senator Norris stated that the real reason behind the

objection was the protection of the "privilege" which the present law gives to choose in litigation between two tribunals, either Federal or State. He stated that with the exception of Hon. Paul Howland, who appeared as a representative of the American Bar Association, every witness who appeared at the hearing before the sub-committee, except the Attorney General, in opposition to the proposed legislation, was an attorney for some large and powerful corporation.

Speaking of the American Bar Association, Senator Norris, in the report, says:

"The American Bar Association, as everyone knows, is composed of many of the leading, brightest attorneys in the United States. Most of these attorneys, especially those who in reality have charge of the operations of the association, are, in their practice, attorneys for great corporations and do a great deal of their business, especially the most remunerative part of it, in the Federal courts. Their ability and their patriotism and their interest in good laws are conceded and recognized. But they are all human. If this bill should become a law it would affect the financial income of many of these leading attorneys. Their fees in Federal courts, being higher than the fees in State courts, would have a direct effect upon their financial returns. Their business likewise would be somewhat curtailed. If all lawsuits involving only State questions were tried in the State courts there would be less legal business for foreign attorneys and more legal business for local attorneys. It is, therefore, only fair to take this matter into consideration and it is only natural that it should be taken into consideration when we find that a large majority of the members of the bar opposing this legislation are, in fact, not only attorneys for corporations and wealthy individuals who would lose the right to choose between courts in their litigated matters, but who would likewise lose a portion, at least, of their most valuable professional work."

Senator Norris states that the present law leads to discrimination and injustice and is "defended on the ground—and the only ground—that when a non-resident goes into a State court he can not get justice because it is alleged there is a prejudice in the State against non-residents."

The report further states that the present law makes property rights more valuable than human rights, in that a non-resident is given an unfair advantage for his property, an advantage which does not accrue in favor of his personal liberty.

It is urged that the enactment of this legislation would give relief of federal courts from congestion. "If all the cases involving diverse citizenship should be left for the State courts, where they fairly and honestly belong, this congestion in Federal courts would be relieved, the demand for more Federal judges would disappear, and all this would occur without any injustice to anyone."

The report states that the measure "can not be successfully attacked on constitutional grounds" and "it would be perfectly constitutional for Congress to pass an act which would abolish every Federal court in existence except the Supreme Court."

The measure is now on the Calendar of the Senate for consideration.

The Committee on the Judiciary of the House of Representatives at a meeting on April 5th, took

up for consideration H. R. 10594, which is the Attorney General's bill, and after amending it to provide that the matter in controversy must exceed \$7,500, ordered it favorably reported to the House of Representatives. The measure was subsequently reconsidered and the committee voted not to amend the jurisdictional amount but to leave it \$3,000. However, the committee voted to report favorably to the House H. R. 4526, known as the Bulwinkle bill, which changes the jurisdictional amount from \$3,000 to \$7,500.

Under date of April 11, 1932, the Chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association, Honorable Paul Howland, addressed a telegram to the Chairman of the Judiciary Committee of the House of Representatives, Honorable Hatton W. Sumners, as follows:

"H. R. 10594 radically modifies jurisdiction of Federal Courts in diverse citizenship cases and increases jurisdictional amount from three thousand to seven thousand five hundred. American Bar Association is opposing the enactment of this legislation and would like to be heard. Respectfully ask that action reporting bill be reconsidered and opportunity for hearing given."

The House Committee voted against the allowance of this request.

#### Anti-Injunction Legislation

President Hoover, on March 23, 1932, upon the recommendation of Attorney General, William D. Mitchell, signed the so-called anti-injunction bill (H.R. 5315), which had been passed by Congress, thus making it a law (Public No. 65).

In announcing that the President had approved the bill, the White House made public a letter from the Attorney General to the President which reads as follows:

"Under date of March 21 you transmitted to me H. R. 5315, an act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes, with the request that I advise you whether there is any objection to its approval. This bill is the one commonly known as the anti-injunction bill.

"Objections have been made to this measure because of the alleged unconstitutionality of some of its provisions, among which are those relating to contracts between employers and employees by which the latter agree not to be members of labor organizations and which are commonly called yellow dog contracts.

"One of the major purposes of the bill is to prevent the issuance of injunctions to restrain third parties from persuading employees to violate such contracts, the theory of the bill being that such contracts are exacted from employees not with the idea that they will be treated by the employer as binding obligations but as a basis for invoking the old common law rule against malicious interference with contracts by third persons, and in this way to enable employers to secure injunctions against peaceful persuasion directed at their employees.

"There are various other aspects of the bill, the unconstitutionality of which has been debated. It seems to me futile to enter into a discussion of these questions. They are of such a controversial nature that they are not susceptible of final decision by the executive branch of the Government, and no executive or administrative ruling for or against the validity of any provisions of this measure could be accepted as final. These questions are of such a nature that they can only be set at rest by judicial decision.

"Many objections have been made to the supposed effect of various provisions of this bill. In a number of respects it is not as clear as it might be, and its interpretation may involve differences of opinion, but many of these objections are based on extreme interpretations which are not warranted by the text of the bill as it was readjusted in conference.

"It is inconceivable that Congress could have intended to protect racketeering and extortion under the guise of labor or-

ganization activity, and the anti-trust division of this Department, having carefully considered the measure, has concluded that it does not prevent injunctions in such cases and that it does not prevent the maintenance by the United States of suits to enjoin unlawful conspiracies or combinations under the anti-trust laws to outlaw legitimate articles of interstate commerce.

"It does not purport to permit interference by violence with workmen who wish to maintain their employment, and, fairly construed, it does not protect such interference by threats of violence or that sort of intimidation which creates fear of violence.

"With due regard for all the arguments for and against the measure, and considering its legislative history, I recommend that it receive your approval."

#### Declaratory Judgments Bill

Mr. Montague, from the House Judiciary Committee, presented House Report No. 627 on February 26, recommending the enactment of H. R. 4624, extending the judicial power for the rendition of "declaratory judgments." The bill, which is now on the House Calendar, amends the Judicial Code by adding after section 274 C a new section to be numbered 274 D.

On March 31, Mr. Sumners of Texas, from the Committee on the Judiciary of the House of Representatives, reported favorably (House Report No. 957) the bill (H. R. 10587) to provide for alternate jurors in certain criminal cases. The purpose of the legislation, which is recommended by the Attorney General, is to prevent mistrial of cases wherein a juror dies or becomes so ill as to be unable to continue the performance of his duties. It provides that if the trial appear likely to be a protracted one the court, in its discretion, may direct that one or two alternate jurors shall be selected and sworn, these alternate jurors to hear the testimony and to act as a substitute in case a regular juror become sick or disabled during the trial. The bill is on the Union Calendar of the House of Representatives.

Mr. Montague, from the Committee on the Judiciary, reported, on April 7, H. R. 7238, to amend the suits in admiralty act. The report is No. 1012.

On April 5, Representative Sirovich presented a report (House report 1008) from the Committee on Patents on House Bill 10976, to amend and consolidate the acts respecting copyright and to codify and amend common law rights of authors in their writing. The measure is now on the Union Calendar of the House of Representatives.

#### Review of United States District Court Cases

On April 11 the Senate proceeded to consider the bill (S. 941) relating to the review of cases tried in the District Courts of the United States without a jury, which had been reported by the Committee on the Judiciary with an amendment. The amendment was agreed to and the bill passed. As passed by the Senate, the measure provides:

"That section 700 of the Revised Statutes (U. S. C. title 28, sec. 875) is amended to read as follows:

"Sec. 700. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon appeal; and in any case, whether the finding be general or special, the review may extend to the determination of the sufficiency of the evidence to sustain the judgment."

The measure now goes to the House of Representatives.

#### Patents

The following measures, relating to patents, were on April 5th, ordered favorably reported to

the House of Representatives by the Committee on Patents:

H. R. 8984, Rep. Sirovich, to authorize the licensing of patents owned by the United States.

H. R. 11054, Rep. Mobley, to prevent fraud, deception or improper practice in connection with business before the Patent Office.

H. R. 10924, Rep. Gavaghan, to amend the United States Code, title 35, section 64, regarding the effect of reissued patents.

H. R. 11010, Rep. Swank, to amend the statute relating to patent disclaimers.

H. R. 11087, Rep. Patterson, to abolish the statute permitting renewal of patent applications.

H. R. 7428, Rep. Sirovich, by request, to amend U. S. Code, title 35, section 37, regarding abandonment of patents on failure of the applicant to prosecute them within six months after action.

## The Institute of The Cleveland Bar Association

By H. E. VARGA

**R**EALIZING its obligation to the profession The Cleveland Bar Association launched an interesting experiment in adult education during the fall of 1931. It organized an Institute for the purpose of providing the bench and bar of Northern Ohio with an opportunity to learn of the recent developments in the divers branches of legal science. Eminent teachers and scholars were asked to deliver a course of lectures on three succeeding afternoons between 4:15 and 6:00 o'clock, P. M.

The opening lecture course was given on October twenty-first to the twenty-third by Dean Roscoe Pound of the Harvard Law School on "Recent Developments in Equity of Interest to the Practicing Lawyer." The lectures were delivered in an auditorium in the down-town section. The attendance was close to five hundred. The students of the senior classes of the law schools in Cleveland were invited to attend the course, free of charge. The expenses of lectures were defrayed by the advance sale of tickets for the entire course and the sale of single tickets at the door. Dean Pound's lectures have been received with uniform satisfaction. The officers of the Institute felt justified in making arrangements for additional lectures. Prof. Francis H. Bohlen, now of the University of Pennsylvania Law School was asked to deliver three lectures. These were given on February seventeenth to the nineteenth, the subject being "Recent Developments in the Law of Torts of Interest to the Practicing Lawyer." The attendance was gratifying again. The time was set again for a quarter after four in the afternoon on Wednesday, Thursday and Friday.

Prof. Bohlen's fine exposition, based partly on the American Law Institute's last draft on Torts, was of such interest and value to the practicing lawyer, that it was decided to continue the series next fall. The scope may be enlarged and three separate courses may be offered, most likely on Trusts, Evidence and Contracts. The time would

be set again for Wednesday, Thursday and Friday afternoons, from 4:15 to 6:00 o'clock, P. M. It is planned to have one course given in the fall, one during the winter and one during the spring.

The vigorous leadership of Hon. Walter L. Flory, President of The Cleveland Bar Association, and the diligent work of several committees, under the chairmanship of James B. Dolphin, Esq. carried the work of the Institute to a successful realization. The sympathetic interest and cooperation of the leading lawyers and judges, the participation of the faculty and students of Western Reserve University Law School, resulted in the moral and financial success of the Institute. A small surplus fund remained for defraying a part of next year's expenses.

On the opening day of the Institute's lectures, Dean Pound and Mrs. Pound were entertained at luncheon by the Cleveland alumni of the Harvard Law School. The graduates of the University of Pennsylvania joined the members of the Institute's general committee in tendering a luncheon to Prof. Bohlen on the first day of his lectures. Hon. Atlee Pomerene spoke on the work of the American Law Institute. Prof. Bohlen dealt with the President's happy choice of Chief Judge Cardozo as a successor of Mr. Justice Holmes. Prof. Bohlen spoke of Mr. Justice Cardozo as the "patron saint of law teachers."

A printed assignment of readings and outline of topics to be discussed has been distributed about ten days before the lectures, in order to give a better opportunity for preparation and study.

The "junior bar" has been given a practical training course in procedure and practice, during the last few years. The rank and file, however, has welcomed the innovation offered by these courses.

The lecturers have been courteous and kind in acceding to the request of the Institute to furnish a list of cases, a summary of the lectures ahead of time.

One of the valuable results of these lectures is to familiarize the members of the bench and bar with the importance of the restatements of the law by The American Law Institute and the principles underlying these restatements.

The work of the Institute of the Cleveland Bar Association was endorsed by a number of our local judges and lawyers. Col. John H. Wigmore of the Northwestern University Law School has sent to us a fine statement also. It reads as follows:

"The Cleveland Bar Association plan for an Institute impresses me as one of the most important prognostications of progress in recent times for restoring the bar to a position of intellectual leadership. It will not be long before the example is followed by other metropolitan bars; for it is exactly in keeping with the trend of the times, though at present ahead of them. It will enable the Bar to take a progressive leadership, and will assist appreciably in raising the level of legislation and in keeping the law in harmony with social needs. I trust that your Association will have the courage to continue the Institute's activities."

Thus, The Cleveland Bar Association has brought the law teacher and the practitioner into closer contact and is seeking to afford continued legal education of the highest order to its membership.

## AMERICAN BAR ASSOCIATION JOURNAL

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JOSEPH R. TAYLOR,  
MANAGING EDITOR

Journal Office: 1140 N. Dearborn Street  
Chicago, Illinois

### GOOD TIDINGS

In times like these it is a special pleasure to be the bearer of good tidings. This pleasing opportunity is afforded by the results of the membership campaign to date.

More new members have been recruited since the beginning of the present fiscal year than during any entire year in the history of the Association. By the time the fiscal year ends, over two months from now, the comparison will be even more astonishingly in favor of 1931-32.

Fewer members are delinquent in the payment of their dues than at the corresponding date last year. When we consider the course of events during the last twelve months this, too, is a fact of no mean significance.

Additional applications are coming in to President Thompson's office, in response to his appeal, by every mail. The campaign is still in full swing. It is impossible to estimate at this time what the final figures will be.

The enthusiastic and prompt response of the membership to the President's appeal mainly accounts for the results already achieved. At a time when one might well hesitate to ask for special effort in behalf of any organization, the members of the American Bar Association have outdone all previous records. The reserves of energy, enthusiasm and devotion to the profession and its ideals were there, merely waiting to be unlocked.

This demonstration of loyalty and interest in the Association would be notable

even in ordinary times. Today it is doubly so. It is a guarantee that the organization is understood and appreciated and that its work to improve the administration of justice and uphold the ideals of the profession will go steadily on.

### A COMMITTEE'S CURIOUS ATTITUDE

We believe that those who are opposing the passage of the Norris Bill, to limit the jurisdiction of District Courts of the United States, are entitled to protest against certain imputations contained in the Report of the Senate Judiciary Committee of April 7. Particularly is this true of the American Bar Association, whose representatives, in accordance with repeated instructions, have been fighting the measure.

Referring to this particular organization, the report says on page 4 that the "American Bar Association, as everyone knows, is composed of many of the leading, brightest attorneys in the United States. Most of these attorneys, especially those who in reality have charge of the operations of the Association, are, in their practice, attorneys for great corporations and do a great deal of their business, especially the most remunerative part of it, in the Federal Courts. Their ability and their patriotism and their interest in good laws is conceded and recognized. But they are all human. If this bill should become a law it would affect the financial income of many of these leading attorneys. Their fees in Federal Courts, being higher than the fees in State Courts, would have a direct effect upon their financial returns. Their business likewise would be somewhat curtailed. . . It is, therefore, only fair to take this matter into consideration, and it is only natural that it should be taken into consideration, when we find that a large majority of the members of the bar opposing this legislation, are, in fact, not only attorneys for corporations and wealthy individuals who would lose the right to choose between courts in litigated matters, but who would likewise lose a portion, at least of their most valuable professional work."

We leave others to speak for themselves, but as far as the American Bar Association is concerned, it would be difficult to find a passage anywhere more replete with unjustifiable imputations. The Association's op-

position to the measure is of long standing. It has for years opposed this particular effort to cripple the Federal Courts and it has based its opposition to it on perfectly clear and logical grounds. It has dealt with the question strictly on its merits and the arguments of its committees have been wholly on this plane. There is nothing whatever to indicate that its attitude, frequently confirmed, has been due to any considerations of personal or professional profit. We believe that there is much in its record to cause a fair-minded man to admit that its decisions, openly arrived at in Committee and at annual meetings, have represented an honest effort to do what it could for the administration of justice, without regard to the sordid and selfish motives which seem to loom so large in the Committee's report.

It is indeed astonishing that a group of lawyers cannot oppose an effort to change a law which has the authority of so many years behind it—which, in the words of Chief Justice Taft, has done more than any single element in our governmental system to secure capital for the legitimate development of enterprises throughout the West and South, without being told they are largely influenced by improper and wholly selfish considerations. The presumption is certainly in favor of the law which has the sanction of a long continuance. The burden of proof is overwhelmingly on those who propose to change it. Surely there are enough thoroughly reasonable grounds on which a change may be opposed to render it unnecessary for its proponents to go on a still hunt for personal and contemptible motives. The ascription of such motives will generally be found to be a plain confession that those responsible for it are finding the burden of proof increasingly difficult and think it advisable to resort to extraneous aids.

The paragraph in question says that "when we find that a large majority of the members of the Bar opposing this legislation are . . . attorneys for corporations and wealthy individuals" etc. This can only refer to the attorneys who appeared before the Committee. There was no information available to the Committee or anyone else which would justify any statement that a large majority of the members of the Bar as a whole who oppose the legislation are attorneys for corporations and wealthy in-

dividuals. Probably the only data as to even a large section of the Bar was furnished by the resolution under which the representatives of the American Bar Association acted. And that resolution certainly raised a presumption at least that a large organization, with a membership overwhelmingly composed of men who are not attorneys for large corporations and wealthy individuals, was actively opposing the measure.

Of course this part of the Committee's report is entirely irrelevant. It really matters little whether those who opposed the measure are influenced by selfish considerations or not. Legislation is not properly decided by counting personal noses or personal interests. What matters is whether their arguments are good or bad. This and every other question ought to be decided on the merits. And those who are urging the bill have totally failed to sustain the burden of proof. They say there is still no prejudice against a foreign individual or a foreign corporation in a State Court. There are those who insist as strongly that there is, and who assent wholly to the statement of the late Chief Justice Taft that "I venture to think that there may be a strong dissent from the view that danger of local prejudice in State Courts against nonresidents is at an end."

They say that to destroy this jurisdiction would relieve the pressure on the Federal Courts. But they do not say that the relief would be accomplished by imposing an added burden on State Courts, which are struggling with their own problems of congestion. They say the present law leads to discrimination and injustice, but they are blind to the discrimination and injustice and possible economic loss that this change might entail. They say the present law has its defects in administration, but they see no possibility of such defects in the future, if their plan is adopted. They say those who oppose the measure are influenced by selfishness, but they do not fail to appeal to the supposed self-interest of local attorneys, when they declare: "If all lawsuits involving only state questions were tried in the State Courts there would be less legal business for foreign attorneys and more legal business for local attorneys."

It is sincerely to be hoped that Congress will lay aside this and similar measures and turn itself to the really constructive tasks that require to be done.

# REVIEW OF RECENT SUPREME COURT DECISIONS

Two Cases Relating to Equity Jurisdiction of the Federal Courts to Enjoin Collection of State Taxes Where It Is Alleged That Taxes in Question Are Unconstitutional—  
Case in Which R. S. Sec. 3224, Forbidding Suit to Restrain Collection or Assessment of Any Tax, Does Not Apply—Landowner Not Entitled to Enjoin Government Agents from Proceeding under the Mississippi River Flood Control Act—Validity of Interstate Commerce Commission Order Based on Conditions Which Have Changed Since Close of Record—Allowance of Expert Witness Fees in Federal Courts—Material Variation of Surety's Risk

BY EDGAR BRONSON TOLMAN\*

## Taxation—Equity Jurisdiction of Federal Courts to Enjoin Collection of State Taxes

The reason underlying the general rule in equity that the collection of taxes will not be enjoined where there is an adequate remedy at law is of peculiar force in cases where the suit is brought in a federal court to enjoin the collection of state taxes. Where the tax is alleged to violate a federal right of the person against whom it is assessed, the federal courts will not enjoin collection of the tax where the party aggrieved has an adequate remedy at law in the state courts.

A state statute providing relief supplementary to an action at law for recovery of a tax, and authorizing the granting of an injunction against a tax collecting officer of the state, to enjoin him from depositing with the state treasurer money paid under protest by the taxpayer, does not create a right in the federal courts to an injunction against collection of the tax.

*Matthews v. Rodgers*, Adv. Op. 271; Sup. Ct. Rep. Vol. 52, p. 217.

*Stratton v. St. Louis Southwestern Ry. Co.*, Adv. Op. 276; Sup. Ct. Rep. Vol. 52, p. 222.

These two cases relate to the equity jurisdiction of the federal courts to enjoin the collection of state taxes where it is alleged that the taxes in question are unconstitutional. *Matthews v. Rodgers* involved a suit in a federal court in Mississippi, specially constituted, to enjoin the collection of an annual license or privilege tax of \$100 payable by "every person engaged in the business of buying or selling cotton for himself." Employers buying or selling cotton are required to pay \$25 for each person engaged as buyer or seller. Penalties are imposed in double the amount of the tax for its non-payment. Failure to make application for the license, or proceeding in business without license or payment are misdemeanors punishable by fine not exceeding \$500, or imprisonment not exceeding six months, or both. The bill, brought on behalf of the appellees and others similarly situated, alleged that they were engaged in interstate commerce, that enforcement of the tax as to the appellees would be an unconstitutional burden on interstate commerce, and that the state officers threaten to enforce collection by criminal proceedings and the imposition of penalties. Resort to equity was justified in the bill for the following reasons, among others:

(1) Enforcement of the statute would irreparably injure or destroy the appellees' business.

(2) The tax, if paid, cannot be recovered by action at law.

(3) The state statutes confer equitable jurisdiction on the state courts to enjoin collection, and that remedy is available in the federal courts.

(4) That equitable relief is necessary to avoid multiplicity of suits by others affected by the tax.

The district court enjoined collection of the tax, but on appeal to the Supreme Court the decree was reversed, in an opinion by MR. JUSTICE STONE. In explaining the decision a statutory provision, in effect since the Judiciary Act of 1789, declaratory of the rule previously existing in equity, was pointed to, declaring that suits in equity shall not be entertained in courts of the United States "in any case where plain, adequate and complete remedy may be had at law." The reason for the rule was thought peculiarly applicable to cases brought in the courts of one sovereignty to enjoin collection of taxes by another sovereignty.

The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code § 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.

Decisions of the highest state court were then examined to determine whether adequate relief existed at law for the recovery of the taxes after payment, the assumption being indulged that irreparable injury avoidable only by equitable relief would otherwise result, if the appellees failed to pay the tax. From such examination of the state decisions the conclusion was reached that adequate relief exists at law in Mississippi, since recovery may be had in an action at law if the tax is paid under protest, and the federal right under the Constitution is thus protected.

From an examination of the decisions of the highest court of the state we conclude, as the Attorney General of the State insists, that that procedure is open to the appellees in Mississippi, if the tax is paid under protest, to

\*Assisted by JAMES L. HOMIRE.

avoid penalties or criminal proceedings. In *Coulson v. Harris*, 43 Miss. 728, the Supreme Court of Mississippi denied the jurisdiction of equity to enjoin the collection of an illegally assessed tax on the sole ground that the taxpayer might pay the tax to the collecting officer and sue at law for its recovery. In *Tuttle v. Everett*, 51 Miss. 27, recovery was allowed of a tax thus paid, in a suit at law brought against the collector before he had paid over the tax to the proper treasury. In *City of Vicksburg v. Butler*, 56 Miss. 72, and *Pearl River County v. Lacy Lumber Co.*, 124 Miss. 85, suits at law for recovery of a tax, were maintained against the city, in the first case, and the county, in the second, to which the collector had paid the taxes.

It was stated further that suit against the collecting officer rather than the state or municipality, affords an adequate legal remedy, in the absence of allegations of special circumstances showing inability of the taxpayer to pay the tax or of the collecting officer to respond to the judgment.

In regard to the alleged right under the state statute to enjoin collection, the Court observed that, even if applicable to cases in which adequate relief is afforded at law, such right cannot enlarge the equitable jurisdiction of the federal courts.

While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity, if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate.

In conclusion, the attempt to invoke equitable jurisdiction to avoid multiplicity of suits was also discussed. That ground of jurisdiction was found wanting here, where the issues tendered as to each appellee would be different, since the nature of the business of each and effect of the statute as applied to each might vary, so that determination of one case would not be conclusive as to another.

*Stratton v. St. Louis Southwestern Railway Company* raised a similar question involving a suit to enjoin collection of the Illinois minimum annual corporation franchise tax of \$1,000. The respondent railway company contended that the tax constituted an unconstitutional burden on interstate commerce and violated the due process clause of the Fourteenth Amendment. The bill alleged a threat of revocation of the corporation's certificate of authority to do business in the state, and consequent irreparable injury for failure to pay the tax.

Applying the principle discussed in *Matthews v. Rodgers*, the Supreme Court, in an opinion by Mr. Justice Stone, reversed a decree of the district court, three judges sitting, which had granted the injunction prayed for. An examination of the law of Illinois disclosed that a tax paid under duress and protest that it is illegally exacted may be recovered at law against the taxing body (except the state itself) or against the collecting officer. Payment to avoid forfeiture of a corporate franchise is held to be duress within the meaning of the rule.

Consideration was given also to a provision of the Illinois statute requiring the collecting officer or other agency to hold for 30 days all moneys received under protest, and on expiration of such period to deposit the same with the State Treasurer, unless the party making payment has meanwhile obtained a temporary injunction restraining such deposit. This was recognized as not purporting to confer any new remedy for recovery of the tax, or as impairing the legal remedy. It merely supplements the legal remedy so as to make

the funds available to satisfy a judgment against the collector. Referring to certain Illinois cases touching the question, the Court said:

These cases recognize the continued existence in Illinois of the right to recover the tax. The fact that in them the suits brought were denominated "equitable," although the only relief of an equitable nature, sought or allowed, was the injunction against payment over of the tax, which was but incidental to the recovery of the money, cannot alter the character of the right as one enforceable at law. In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them by the state practice. . . . By this test the remedy by suit to recover a tax which has been paid is essentially a legal remedy, and it is not any the less so nor any the less adequate because the state practice has annexed to it an equitable remedy.

There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it in the absence of allegations setting up special circumstances which would render the legal remedy inadequate.

*Matthews v. Rodgers*, was argued by Mr. J. A. Lauderdale for the appellants, and by Messrs. Sam C. Cook and Edward W. Smith for the appellees.

*Stratton v. St. Louis Southwestern Railway Co.*, was argued by Mr. Bayard Lacey Catron for the appellant and by Mr. Josiah Whitnel for the appellee.

#### Taxation—The Oleomargarine Tax—Injunction to Restrain Collection of Tax

Under the Oleomargarine Act products made of vegetable oils and containing no animal fat are not taxable as oleomargarine.

Collection of a tax purporting to be imposed by virtue of the Act, but on a product not taxable thereunder, will be restrained by injunction in the federal courts, where irreparable injury will result from collection of the tax, and there is no adequate legal remedy. Since the product in question is not covered by the act and the collection of the tax would work irreparable injury, the provisions of R. S. § 3224, providing that no suit shall be maintained to restrain the collection or assessment of any tax, do not apply. R. S. § 3224, being declaratory of a principle applied generally in equity, did not abolish the exceptions to the principle recognized in equity.

*Miller v. Standard Nut Margarine Co. of Florida*, Adv. Op. 284; Sup. Ct. Rep. Vol. 52, p. 260.

In connection with *Matthews v. Rodgers* and *Stratton v. St. Louis Southwestern Ry Co.*, cases *Miller v. Standard Nut Margarine Co. of Florida* may be considered. There an injunction was granted against the collection of a tax on the respondent's product under the Oleomargarine Act, a federal statute, upon the ground that the product was not within the Act, and that collection of the tax would work irreparable injury to the respondent's business. The Commissioner of Internal Revenue had at various times ruled that products similar to the respondent's, although containing no animal fat and composed of vegetable oil, salt and coloring matter, were subject to the tax. But the lower courts had ruled otherwise, and the Commissioner apparently had acquiesced in such rulings. Under such conditions the respondent undertook to manufacture "Southern Nut Product," a vegetable oil product, containing no animal fat, and developed a valuable business in the sale of the product.

Thereafter, under instructions from the deputy commissioner the petitioner demanded and threatened

to collect a tax of 10 cents a pound on the respondent's product. Suit for an injunction was then brought against the collector in the district court, and the injunction was granted. The circuit court of appeals affirmed the decree.

On certiorari this was affirmed by the Supreme Court in an opinion by MR. JUSTICE BUTLER. The history of the controversy, of which the foregoing is a summary, and which preceded the respondent's entry upon the manufacture of the product was first set forth in the opinion. The Court's conclusion was then stated:

We are of opinion that, as held below and here claimed by respondent, the product in question was not taxable as oleomargarine defined by § 2 of the Act of 1886.

An analysis of the Oleomargarine Act and its history followed, in support of the conclusion stated.

The propriety of granting equitable relief in the form of an injunction was then considered. The collector contended that the relief sought was precluded by the terms of R. S., § 3224 providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Holding this declaratory of the rule generally followed in equity, the Court concluded that it did not abrogate the exceptions to the rule which equity also recognizes.

Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1887, 14 Stat. 475) which became R. S., § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. . . . Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. . . . The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to § 3224 in a number of cases. . . . It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. . . .

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent and therefore the reasons underlying § 3224 apply, if at all, with little force. . . . Respondent commenced business after the product it proposed to make had repeatedly been determined by the Commissioner and adjudged in courts not to be oleomargarine or taxable under the Act and upon the assurance from the Bureau that its product would not be taxed. For more than a year and a half respondent sold its product relying that it was not subject to tax. If required to pay the tax its loss would be seven cents per pound. Before the Commissioner's latest ruling respondent had made and sold so much that the tax would have amounted to more than it could pay. Petitioner acquiesced in the injunctions granted in Rhode Island and the District of Columbia and did not assess any tax upon identical products contemporaneously being made by complainants in such suits and directed enforcement against respondent's entire product. Such discrimination conflicts with the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform

throughout the United States. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, § 3224 does not apply. The lower courts rightly held respondent entitled to the injunction.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE were of the opinion that the suit was precluded by R. S. § 3224.

Enacted in 1867, this statute, for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged.

The case was argued by Mr. Whitney North Seymour for the petitioners and by Messrs. George N. Murdock and E. T. McIlvaine for the respondent.

#### Statutes—Mississippi River Flood Control Act— Injunctions—Adequate Remedy at Law

A landowner whose lands will be subjected to additional flooding by reason of the construction of diversion channels under the Mississippi River Flood Control Act, is not entitled to enjoin the government's agents from proceeding with the work provided for by the Act, even though condemnation proceedings to acquire flowage rights over his lands have not been had, as provided by the Act. The landowner has an adequate remedy at law for the recovery of compensation for the rights taken, and an injunction will not issue, since the Fifth Amendment does not entitle the landowner to payment in advance of the taking.

*Hurley v. Kincaid*, Adv. Op. 347; Sup. Ct. Rep. Vol. 52, p. 267.

This opinion dealt with the right of a landowner to an injunction to enjoin the carrying out of any work in the Boeuf Floodway under the Mississippi Flood Control Act. Specifically, the relief sought was an injunction against the receiving of bids and the awarding of contracts for guide-levees bounding the Floodway. The Act adopted the Jadwin plan, for protection against floods, contemplating the raising of levees generally three feet, improving the main channel of the river by revetment work, and limiting floodwaters in the channel by means of diversion channels. The Boeuf Floodway is one of the diversion channels embraced within the plan.

The respondent, Kincaid, owned a 160 acre farm in the Boeuf Basin, 125 miles below the point of diversion, and within the Floodway channel. No part of the guide levees will be on his land. He brought suit for an injunction, however, in a federal district court in Louisiana, and alleged that the project will expose his land to additional destructive floods, and that the mere "setting apart (of) this property as a flood way and diversion channel and . . . advertising for and receiving bids for . . . construction of the guide levees" cast a cloud on his title. He also alleged that the government proposes to commence the work without having instituted condemnation proceedings, and that the acts of the defendants in advertising for bids to be followed by letting contracts without condemnation of his land will mean a taking thereof without due process of law and without just compensation.

The parties defendant were the United States, the Secretary of War, the Chief of Engineers and the Mississippi River Commission. The suit was dismissed as to the United States, because it had not consented to be sued, but a motion to dismiss as to the remaining defendants was denied. The district court concluded that the creation of the Boeuf Flood-

way would subject Kincaid's land to additional destructive flood waters, and that by starting work before acquiring or condemning flowage rights over the property, the Government was proceeding contrary to the Act and in violation of the Constitution. The case was later heard on evidence, after an answer had been filed, and an injunction was granted, the court having found against the Government on the issue that the Plan would not subject the land "to additional destructive flood waters," so that § 4 of the Act was not applicable. The injunction enjoined proceeding with the construction authorized by the Act until the Government had acquired flowage rights over the land, either by purchase or by condemnation. The Circuit Court of Appeals affirmed the judgment, but review of case on certiorari resulted a reversal of the decree. MR. JUSTICE BRANDEIS, delivering the opinion of the Court, rested the decision on the ground that the respondent had an adequate remedy at law for damages:

We have no occasion to determine any of the controverted issues of fact or any of the propositions of substantive law which have been argued. Kincaid concedes that the Act is valid and that it authorizes those entrusted with its execution to take his lands or an easement therein. We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. . . . If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. . . . The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking. . . .

As the complainant has a plain, adequate and complete remedy at law, the judgment is reversed with direction to dismiss the bill without prejudice.

The case was argued by Solicitor General Thacher for the petitioner, and by Messrs. H. H. Russell and William C. Dufour for the respondent.

#### Interstate Commerce Commission—Validity of Order Based on Conditions Which Have Changed Since Close of Record

The enforcement of an order of the Interstate Commerce Commission affecting the entire grain rate structure should be enjoined where it appears that profound and widespread economic changes affecting the rate structure took place between the closing of the record (September, 1928) and the effective date of the order, and the Commission has denied a petition for rehearing setting forth the economic changes and their effect on the rate structure.

*Atchison, Topeka & Santa Fe Ry. Co., et. al. v. United States, et. al.*, Adv. Op. 229; Sup. Ct. Rep. Vol. 52, p. 146.

The opinion in this case, delivered by the CHIEF JUSTICE, disposed of an appeal from a decree of a specially constituted district court in Illinois, which had denied the appellants' application for a temporary injunction.

The appellants, carriers and shippers, sought to restrain enforcement of an order of the Interstate Commerce Commission which prescribed certain maximum rates on grain, and required the carriers to cease and desist from certain practices.

The order involved resulted from a general investigation by the Commission, after passage of the Hoch-Smith Resolution of January 30, 1925, as to rates, charges, regulations and practices of carriers. In connection with the investigation into the grain rate structure numerous hearings were held and the record was closed in September, 1928. After protracted argument, the matter was submitted to the Commission for decision on July 1, 1929, and on July 1, 1930, the Commission made its first report, and announced its order to go into effect October 1, 1930. Because of mechanical difficulties in preparing the tariffs, the effective date was postponed from time to time.

In September, 1930, the carriers asked for a rehearing, which was denied in November, 1930. A further petition for rehearing was presented February 18, 1931, describing in great detail the situation then existing, and the profound changes in conditions which had occurred in traffic and transportation conditions since the closing of the record in 1928. This petition alleged that, irrespective of the validity of the order when made, it would no longer be valid under the changed conditions. The adverse effect of the order on the carriers' revenues, the acute financial condition of the carriers and their threatened credit structure were set forth in detail. The Commission denied the rehearing and directed that the order become effective on June 1, 1931.

The suit under consideration was then brought, alleging that the order was in violation of the Interstate Commerce Act and of the due process clause of the Fifth Amendment. Various allegations were made in the petition for an injunction and in the answers, but the broad ground on which the Court rested its decision, may be understood from the foregoing summary of the case.

Holding that the petition for rehearing on February 18, 1931, was in effect a supplemental petition, presenting a new situation which made it a denial of right to put the order into effect without further hearing the Court said:

We do not find it to be necessary to consider these contentions, and the counter arguments advanced on behalf of the Commission, or to review the Commission's reports, as it is sufficient for the present purpose to deal with the fundamental question presented by the action of the Commission in denying the appellants' second application for a rehearing. Ordinarily, a petition for rehearing is for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself.

There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, "a depression such as the country is now passing through

is a new experience to the present generation." The Commission also recognized in that report "the very large reductions in railroad earnings which have accompanied the economic depression," and stated that "the chief cause of these reductions has been loss of traffic." For "in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions."

It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931.

Conceding that ordinarily an order of the Commission "cannot always reflect accurately fluctuating conditions," the Court pointed out that the case here presented involved not mere fluctuating conditions, but a changed economic level.

We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under sections 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. . . . The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. . . . In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.

The case was argued by Mr. Frederick H. Wood for the appellants; by Mr. Daniel W. Knowlton for appellees, the United States and Interstate Commerce Commission; by Mr. John E. Benton for appellees intervening State Commissions of several states; by Mr. Hugh La Master for appellee Nebraska State Railway Commission. Messrs. Charles W. Sterger and Ralph Merriam submitted the cause for appellee Public Service Commission of Kansas.

#### Practice—Allowance of Expert Witness Fees in Federal Courts

The federal courts have no power to allow expert witness fees as taxable costs in actions at law, even though the courts of the state in which federal courts sit are authorized by state statute to allow expert witness fees as costs. Congress by statute has dealt comprehensively with the subject of witness fees, so that the provisions of state law in that regard have no application to actions brought in the federal courts.

*Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, Adv. Op. 334; Sup. Ct. Rep. Vol. 52, p. 223.

In this case, involving an action to recover damages, under the Employers' Liability Act, for the death of the plaintiff's intestate, the plaintiff, after a verdict in her favor, sought an order allowing fees for expert witnesses who testified at the trial. The action was brought in a federal court in Minnesota. A statute is in effect in that State authorizing the trial judges in the state courts, in their discretion, to allow just and reasonable compensation or fees for any witness ex-

amined as an expert in any profession or calling. An application for such an order was made to the federal court, but was denied for lack of power under the federal statutes. On appeal to the circuit court of appeals that court certified to the Supreme Court the following question:

"Has a United States District Court power and authority to allow expert witness fees, and to include the same as part of the taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their direction, to allow expert witness fees, and the practice and usage in said state courts being to make such allowances and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court?"

This question was answered in the negative by the Court in an opinion by the CHIEF JUSTICE. In a brief summary of the history of legislation on this subject it was pointed out that by the Process Act of September 29, 1789, it was provided that "rates of fees . . . in the circuit and district courts, in suits at common law," should be the same as were "used or allowed" in the state courts. It thus became the usage of federal courts to conform to the state laws as to costs unless express provision had been made by Congress, or when no general rule of court existed governing the subject.

But when the Congress has prescribed the amount to be allowed as costs, its enactment controls. . . .

Specific provision as to the amounts payable and taxable as witness fees was made by the Congress as early as the Act of February 28, 1799, c. 19, sec. 6, 1 Stat. 624, 626. See, also, Act of February 26, 1853, c. 80, sec. 3, 10 Stat. 161, 167; Rev. Stat. sec. 848. The statute now applicable is the Act of April 26, 1926, c. 183, 44 Stat. 323. U. S. C. Tit. 28, secs. 600a to 600d. Under these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the Federal courts. . . .

The appellant, seeking the application of the statute of Minnesota, invokes the rule that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States in cases where they apply." U. S. C., Tit. 28, sec. 725. But this provision, by its terms, is inapplicable, as the Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the Federal courts of any different State practice.

A reasonable attorney's fee which may be allowed in specified classes of cases under a mandatory requirement of state law is recoverable in the federal courts, as indicated by *People of Sioux County v. National Surety Company*, 276 U. S. 238, since such fees are "not costs in the ordinary sense," and hence "not within the field of costs legislation" enacted by Congress.

The case was argued by Mr. Everett Sanders for the appellant, and by Mr. William T. Faricy for the appellee.

#### Suretyship—Material Variation of Surety's Risk

Where a fidelity bond is issued to protect a corporation against fraud, dishonesty, forgery and theft of its treasurer and against his neglect in the performance of his duties as prescribed by the by-laws and constitution, and loss of the funds thereafter results from an agreement between the corporation and a bank, under which agreement the corporation agreed to permit certain funds to remain on deposit for a stated time without interest, as a means of inducing the bank to assume the liabilities and

take over the assets of another bank in which the treasurer had wrongfully deposited an amount in excess of that permitted by the by-laws, there is a material alteration of the surety's risk so that it is exonerated from liability on the bond.

Even if the obligation be regarded as in the nature of an insurance contract, rather than of strict suretyship, so that a variation of the risk does not *ipso facto* discharge the insurer, who in order to escape liability must prove that the change was material and prejudicial, the insurer is relieved of liability on the facts shown since what was done made proof of actual detriment impossible.

*American Surety Co. v. The Greek Catholic Union*, Adv. Op. 323; Sup. Ct. Rep. Vol. 52, p. 235.

This case arose out of an action on a bond for \$100,000 executed by the petitioner and conditioned upon payment of pecuniary loss which the respondent might sustain through the failure of its treasurer, Kondor, to faithfully perform his prescribed duties and account for the funds of the respondent corporation. Kondor was also president of the Peoples State Bank of Johnstown, Pennsylvania, and deposited in that bank over \$241,000 of the respondent's funds, an amount in excess of that permitted to be deposited in any one depository by the respondent's by-laws.

The bank became embarrassed and representatives of the State determined that it would have to be closed if certain checks, drawn against the respondent's funds for \$89,000, were issued as then contemplated. News of the situation reached certain officers of the Union, and they were informed that unless \$100,000 additional cash was deposited in the bank it would not be permitted to honor the checks for \$89,000. Their counsel communicated by telephone with officials of the petitioner in Pittsburgh and in New York City, but the latter's lack of authority to act precluded any agreement on the part of the petitioner to pay or deposit the \$100,000. The official in New York City, the general claim agent of the petitioner, was told that negotiations were under way with another bank to take over the assets and liabilities of the Peoples State Bank, and that a definite arrangement would have to be reached in less than 24 hours. Shortly thereafter an agreement was reached with the United States Trust Company of Johnstown, whereby the latter assumed all liabilities of the bank, except its capital stock, in consideration of a conveyance of all its assets. But the trust company did this only upon the respondent's agreement to leave \$200,000 on deposit for 4 years without interest. Thereafter the action involved in this case was brought to recover the loss of interest consequent on Kondor's breach of duty. The trial court allowed recovery, upon the jury's verdict under an instruction permitting it to find whether the arrangement between the respondent and the trust company created a material variance of the surety's risk.

A charge requested by the petitioner that the agreement created a material variance in the contract of suretyship, deprived the surety of recovery of salvage from the Peoples State Bank, and relieved the petitioner of showing that the variance was prejudicial, was refused.

On certiorari, a judgment for the plaintiff, affirmed in the circuit court of appeals, was reversed by the Supreme Court in an opinion by MR. JUSTICE ROBERTS. The circuit court of appeals had proceeded upon the theory that the situation confronting the respondent's officers was similar to that which an insured faces when a fire occurs, and that the efforts at salvage ought not to be held to prejudice variation of the hazard; that the burden of proving that what was done increased

its risk was upon petitioner; and that the trial court had properly left the question as one of fact for the jury.

We cannot agree with this view. Assuming that respondent is right in its contention that the obligation here was in the nature of an insurance contract rather than one of strict suretyship. . . . and that consequently a variation of the risk does not *ipso facto* discharge the insurer, who in order to escape liability must prove that the change was material and prejudicial, it remains, as a practical matter, that what was done made proof of actual detriment impossible. If the bank had been closed, the surety would have remained liable for the penal sum named in the bond, and upon payment thereof would have been subrogated to the respondent's rights against the bank and the defaulting treasurer. Whether the resulting loss would have been more than \$41,000 no one can tell. The state authorities, from such examination as they had made, were of the opinion that the depository might pay from twenty to forty per cent of its liabilities. It appears, however, that by the administration of the United States Trust Company the debts have been paid almost in full, and some assets of doubtful value remain to be converted. The action of the Union's officials has placed the question of probable prejudice due to the adoption of one of the two alternatives presented wholly in the realm of conjecture, and respondent now seeks to cast upon petitioner the burden of proving the consequences of an event which never in fact occurred.

The cases relied on by respondent have to do with an alteration of the terms of a principal obligation prior to any breach, and without the surety's consent. They address themselves to the question whether such a change discharges the indemnitor from liability consequent upon a breach. . . .

The instant case presents an altogether different situation. A breach had occurred which entailed a loss for which the bondsman was liable; and thereafter the obligee, without consulting the surety, entered into a wholly new arrangement relative to the recoupment of such loss. The claim is that this action was in fact in the interest of the surety and saved it money, and that if this is not true, the surety must assume the burden of proving what would have been the result of refraining from the attempt to minimize loss. We are referred to no authority in support of this position, and we think it unsound as applied even to the case of a paid surety company, which is often treated as an insurer merely.

The Court then stated another ground which precluded recovery on the bond. The bond guaranteed against fraud, dishonesty, forgery, theft, etc., of the treasurer; against his neglect faithfully to perform his duties as prescribed by the constitution and by-laws; against his omission to keep intact and absolutely to account for the funds; and against the failure of depositaries.

There is nothing in the instrument which by the farthest stretch of construction can be said to undertake the payment of a loss due to an agreement of the corporation to substitute some other bank or trust company for the Peoples Bank. The voluntary action of the respondent in making an entirely new agreement, whereby in effect it loaned \$200,000 to the United States Trust Company for four years without interest, caused the loss for which the suit is brought. In view of the situation confronting it the Union thought well to incur the risk of losing that interest. It cannot now ask that the bond be rewritten to cover an event not therein specified or contemplated. Where an insured without the agreement of the insurer undertakes to substitute a new obligation under a new agreement with a third party in lieu of those arising from a breach of the officer whose fidelity is insured, thus substituting a new and different liability from any undertaken in the instrument of suretyship, and depriving the insurer of the right of subrogation, such conduct operates to discharge the obligation of the indemnity contract.

MR. JUSTICE McREYNOLDS was of opinion that the judgment should have been affirmed.

The case was argued by Messrs. Edmund W. Arthur and James M. Magee for the petitioner, and by Messrs. Ralph C. Davis and Thomas Stephen Brown for the respondent.

# LEGAL ETHICS AND THE LAW SCHOOLS

What Leaders of Movement for Teaching Professional Ethics in the Law Schools Really Have in Mind Is That These Schools Make Some Intelligent and Wholehearted Attempt to Develop Professional Character—What Can Be Done in This Direction by Such Institutions—Bad Effect of Narrow Point of View of Much Teaching in the Past, Etc.

BY BERNARD C. GAVIT

*Professor, Indiana University School of Law*

**D**UE primarily to the insistence of the Section on Legal Education of the American Bar Association there is a growing and compelled interest in the problem of the teaching of Legal Ethics in the Law Schools.

No small part of the apparent lack of interest, opposition and unwillingness to co-operate displayed by most of the schools can be explained by calling attention to the fact that there is an unusual amount of confusion which arises out of the language used in the campaign. "Legal Ethics" usually connotes the subject matter contained in the Canons of Professional Ethics, and may it be said in behalf of the Law Schools that experience has demonstrated that that subject matter is not worth much of the students' and the instructors' time. As has been often pointed out the Canons deal primarily with "Ethics" in a very narrow and restricted sense: they are directed at the problem of professional politeness: they constitute the form of professional conduct and not its substance. It is true, of course, that they also contain some very general cautionary instructions on the subject of Trusts and Agency as applied to the legal profession: subjects on which the ordinary student however has a rather specialized knowledge in any event.

But it is increasingly apparent that the leaders of the movement for the teaching of Legal Ethics have something else in mind. Unfortunately they have employed misleading language. What they really want is not that the law schools devote more time to the teaching of the rules of Professional Ethics, but that they make some intelligent and whole-hearted attempt to develop Professional Character. The thing which concerns the Bar today is not that the new generations of lawyers do not have a familiarity with the rules of professional conduct, but that they fail when put to the test of the temptations and the ideals of the profession. And it is always true that it is not a verbal knowledge or belief which determines conduct, but a will and a character which compel it. The first can be developed to the point of perfection, but without a development of the latter there is nothing but the semblance of permanent accomplishment. The distinction is between the law school graduate who is simply a repository of legal knowledge and one who is actually professionally minded and "charactered."

So far the law schools have for the most part been content to deal exclusively with the scholastic attainments of their students. But the growing in-

sistence by the American Bar Association that the results are frequently undesirable illustrates that the scholastic standard is too narrow, and is often misleading in a fair appraisal of the fitness of the graduate for professional practice. Can the schools do anything about it?

## II

If we but appreciate the obvious truth that character is a result rather than a means or an end it is clear that they can. It has, of course, been amply demonstrated that to attempt to develop character by teaching or preaching it produces a minus quantity in results. The problem is one of substance rather than of superficial emotion. And on the whole it may well be admitted that the problem is an extremely difficult one and one upon which varying solutions might well be offered and tried. And, too, no one should be so foolish as to expect to appraise the results on the basis of anything other than experience. No Bar Examination can be devised which will test them.

But to me it seems patent that the Bar Association is justified in demanding that the Law Schools re-examine themselves in the light of this additional purpose and that they must give up the scholastic standard as the only criterion for graduation. They must broaden their purposes to include this result.

If that is done it would follow that there must be a reappraisal of both the form and substance of legal education. Character in an attorney is a complex thing: it is a summation of many desirable qualities and characteristics. But a thorough knowledge of legal rules and legal technique, however large it may seem to bulk when measured by quantity standards, is but one of them. We must not, however, minimize its importance, no matter how much we emphasize the importance of other attributes. But even as to these latter knowing and doing are to begin with somewhat co-existent, and so to start with there must be not only a knowledge of legal rules, but also a knowledge of the function of a lawyer.

We need pay little attention to the function of a lawyer as it affects his own selfish individual ends. His background and his environment will amply take care of that. The thing is summed up in the common expression that "a lawyer must first of all make a living." That, however, must be taken with a ton of salt, for in the final analysis, the real quarrel here is with the ideas embodied actu-

ally and inferentially in the expression. The sole possible valid distinction between a business and a profession is whether the purpose asserted and acted upon is one primarily of making a living, or of doing a work of social consequence from which results a living. If one is in business he is in business for gain, and the fact that some slight or great social service may result from his activities is of no concern to him; he has but to hew to the line, and let the results take care of themselves. But if one is really engaged professionally in a profession, gain is a secondary result and neither a primary purpose or result. If the quotation above be corrected it should read: "A lawyer must last of all make a living." The change is not at all disastrous, for under our present economic set-up the living results more or less inevitably, and sometimes even in some liberal proportions.

In other words a profession is socialized: a business is individualized. A profession sets up ideals of conduct which go beyond the immediate: it attempts to appraise the social consequences of professional conduct: and it is organized for the avowed purpose of improving and enforcing the ideals of the group. Thus it is that one who is defrauded by a lawyer rightly complains to "the Bar," and "the Bar" must continue to accept responsibility for its ideals and its practices. Once it ceases to do that it becomes a business organization and not a professional one.

But one can be justly alarmed at the extent to which the non-professional idea has invaded the Bar. The action of the Section on Legal Education is therefore timely and reasonable. Because certainly it is not necessary to produce any arguments to sustain the validity of the professional ideal as applied to the administration of justice. Its very purpose is a social advantage, and one has only to observe the present business depression to learn what a failure the Bar would be were it to abandon a socialized and professional ideal in favor of a strictly business and individualized point of view. The business of an attorney is truly affected with a public interest in no small degree, and we can always profit by instruction which emphasizes that fact, and all of its consequences. And certainly no one need apologize for insisting upon the maintenance of the highest ideals and purposes for the legal profession. We need give them no metaphysical content, for as a pragmatic proposition it is impossible to operate any enterprise without some rather definite purposes previously determined upon. That they go beyond the immediate and advance into the field of the ideal is after all a practical advantage, at least when one is dealing with an enterprise which is so closely associated with a governmental and social function as is the legal profession.

### III

And, of course, the real truth is that regardless of whether or not there has been a conscious purpose on the part of those engaged in legal education to develop professional character, the professional character of law school graduates has inevitably been practically if not wholly determined by their law school experience. Whatever the law school does has a result in the lives and characters of its products. And it is sadly true, as the present movement indicates, that the cheapness, the narrowness,

the metaphysics, the formalism and the bread and butter nature of much law school instruction has produced negative results in professional character.

Once we assume that an attorney owes any duty to the courts and the public generally (in other words that he is a prospective leader in the administration of justice and other governmental functions) a broad and tolerant point of view is a first requirement. It is a serious indictment of the form and substance of legal education that it has been dedicated to the reactionary and conservative maintenance of the *status quo*, rather than to a tolerance of change and proposed changes which is the very genius of democratic government. Whenever you teach a young man that there is a metaphysical content to The Law you have temporarily, at least, incapacitated him from acquiring that tolerant point of view. Metaphysics is an unnecessary handicap to social progress, and the law schools ought to divorce themselves from it.

In the more narrow field of an attorney's representation of his client the same thing is true. The late Dean James P. Hall defined "legal reasoning" as "that ability to analyze complicated facts, to reduce instances to principles, and to *temper logic with social experience*." Too often the latter requirement is overlooked. Courts are constantly re-framing legal assumptions to conform to the modern viewpoint, and the average losing lawyer regards the result as a startling, illegal innovation—"wrong on principle." He forgets, or probably does not know, that that procedure is a necessary and proper portion of the judicial function. Had he stopped to temper his logic with social experience he could probably have foretold the adverse result and saved his client much time and money. A great many things which were "true" fifty years ago are not "true" today.

But primarily that is not his fault. He has been taught that the previous assumptions and all of their logical inferences were "the law" which could be changed only by an act of the legislature.

The result is simply this, that while it has often been said by high authority that a "lawyer must be conservative, else he is no lawyer," the opposite is the more correct postulate. It is no good trying to insist on anything but a scientific outlook in the field of the law, or in any other of the social sciences. It is increasingly apparent that what we do not "know" about social, political and economic existence almost equals—if it does not exceed—what we do not "know" about the physical universe.

Law school instruction whose form or substance tends to produce a non-tolerant, non-scientific outlook in the character of its product has given to the legal profession a member who is handicapped in the proper discharge of both his private and public obligations. He is a stumbling block and not a creative power in social progress. His character has the wrong, and a disastrous bent.

The law as conceived and taught in the past has a narrowing influence. But a broadening influence can be found. The broader and more tolerant views in any field and individual are the result of more (broader and deeper) knowledge and speculation. Law school training quits too soon. (And undoubtedly, too, it begins too late, and not at the beginning.) It quits when it has prepared a fairly competent workman, and before there is much of

an opportunity to produce a fairly competent professionally-minded attorney. A deeper and broader understanding of law and the functions of Law can come only through competent instruction in the field which is commonly called Jurisprudence. Without it your student operates upon his own narrow assumptions and postulates. His legal philosophy is thus home-made.

When we realize that his own narrow assumptions and postulates are to form the motive and guiding power for his supposedly professional career we perceive that there is here a serious deficiency in his character. He lacks both the professional ideal and the equipment with which to acquire or attain one. It is apparent that if there is to be any course of study required for graduation it is a thorough course in modern Jurisprudence.

It may well be that that calls for an increase in the time allotted to law school education. It is increasingly obvious that although you can develop a fairly competent workman and scholar in three years you cannot also develop a reasonably competent attorney in that time. There is need for ripening, and most of our ills can be attributed to the fact that so far we have been unwilling to give to the project the time necessary for that result.

#### IV

While much can be said against the narrow point of view from which the substantive law is dished out to the law school student, more can be said against the system when the adjective or procedural law is concerned. Here for some reason or other it seems particularly true that the product feels himself dammed as a lawyer unless he be reactionary. A proposed change in the substantive law can sometimes escape without arousing the average lawyer to white-heat, but no proposal concerning a modification of the law of procedure can escape that result. In a field where the only possible criterion is a practical one there is the most metaphysical viewpoint in the average lawyer. Certainly something can be done in the teaching of the procedural subjects to produce the pragmatic viewpoint.

And, too, something can be done to improve the uses to which the law of procedure is put in practice. Much of our difficulty in the proper disposition of the trial work of courts arises out of the fact that the lawyer has never been taught that during the pleading stage of the proceedings he is strictly an officer of the court and not an advocate; that all of the rules of procedure are made to be *observed by lawyers* and not broken if one can get away with it. The student mind can undoubtedly be properly disciplined on that subject with very beneficial results.

#### V

Some suggestions have been made above as to possible remedies. What any given law school ought to undertake is a matter which will have to be left to the individual school. Dean John H. Wigmore described, in an address at the Atlantic City Meeting, what the Northwestern University Law School has been doing. The address will be published in all events in the report of the proceed-

ings of the meeting, so that there is no occasion to do more than call attention to it.

It is reasonably clear that despite the advertised overcrowding of the Bar there will continue to be an increased effort on the part of young men and women to become lawyers. A business career is now less attractive than ever before, and there will for a time at least be a decided drift to the professions as a more desirable prospect. It is all to the good; for it means that the Schools and Bar Examining Boards will have more material than ever from which to choose. It will make possible, too, a training and a choice on the basis of professional character as well as scholastic attainment. Public opinion will support a law school course of four years, and a general raising of scholastic and character requirements. The Bar of this country is faced with its first real opportunity to be a Bar in the best sense of that word, and it is well that both the Bar and Schools immediately emphasize character training as an obvious but necessary means of reaching that end.

#### Against Unseemly Demonstrations in Court

THE Executive Committee of the Cleveland Bar Association has adopted a resolution condemning demonstrations in court rooms when verdicts favorable to defendants in criminal cases are received. The resolutions, as made public by President Walter L. Flory of the Association, read as follows:

"WHEREAS, The President of The Cleveland Bar Association has called the attention of the Committee on Legal Ethics and of this Committee to the fact that demonstrations of an unseemly character now and then take place in our court rooms upon the returning of the verdict of the jury, especially in criminal cases where a verdict of acquittal is returned; and

"WHEREAS, It is of the highest importance in the administration of justice that proper decorum in the court room be at all times maintained, and that all personal considerations should be subordinated to the view that judges and juries are serving the public and not any particular part thereof;

"RESOLVED, That it is the opinion of this Committee that any acts or demonstrations by any persons involved in the administration of justice which tend to create the impression that either the court or the jury have rendered a personal service, are reprehensible. These acts include thanks publicly rendered by successful litigants to the members of the jury or to the court whose decision has been favorable to them."

The Executive Committee took action on the subject following a report of the Committee on Judiciary and Legal Reform in which such demonstrations were condemned and the Judges of the Court of Common Pleas were asked to adopt a Rule of Court or fixed practice preventing them in future.

## CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

### Among Recent Books

**L**AS SIETE PARTIDAS: translation and notes by Samuel Parsons Scott. Introduction by Charles Sumner Lobingier. Bibliography by John Vance. 1931. Chicago and New York: Commerce Clearing House.—The Comparative Law Bureau of the American Bar Association in publishing a complete English translation for the first time of *Las Siete Partidas* has performed a notable service for the student of legal and social history. This great code, completed in 1263, under the direction of Alfonso X "the learned" of Castile, and acquiring full force as a code of laws in 1505, was extended to Spain's overseas possessions in 1535, where it became the common basic law for all of Hispanic America and the Philippines. Even in the Spanish Borderlands which lie within the United States today, in Louisiana, California, New Mexico, and Texas, it has survived into the American period. The *Partidas* constitute one of the monuments of Spanish law, standing midway between the *Forum Judicum* (652 ca.) and the modern Civil Code (1889), and by reason of its large reliance on the code of Justinian, it stood unrivalled for over six hundred years as the greatest digest of Roman law in use by any European nation. Like Justinian's earlier compilation and the later code of Napoleon it has served as a great text-book of legal principles. More than this, it embodied a comprehensive digest of Visigothic law, of Canon law, of local and national Spanish *fueros* and of the decrees of the great councils of Spain.

*Las Siete Partidas*, or the seven books, lacks a completely logical arrangement. The first book, or *partida*, treats of the law of nations, of natural law, usages, ecclesiastical law, and *fueros*, in the main drawn from Roman codes and decretals. The second deals with government and administration, largely concerned with the duties and powers of kings. The third prescribes the laws of procedure and of property and is taken from Roman law almost without exception. The fourth treats of domestic relations. The fifth is given over to the law of contract and maritime law, the former largely Roman in origin, the latter derived from the Catalan *Consulat de la mer*. The sixth is concerned with wills, inheritance, and succession. The seventh contains the penal code and the code of criminal procedure, with interpretation, general principles, and maxims.

The translation fills a bulky volume of 1,484 pages and a comparison with the original text reveals that the task has been accomplished in a most scholarly and painstaking manner. When one is aware of the difficulties involved in rendering thirteenth century legal Spanish into clear, understandable modern English the achievement of the translator in this volume calls for the warmest praise. The text is given a useful historical introduction and analysis based on a wide use

of the literature, evidenced by copious citations. The value of the work is further enhanced by a treatise on the transmission of the text through various printings down to the present, together with a comprehensive bibliography and a note on the location of various editions in the principal libraries of the world. An index enables the reader to find his way about in the *partidas* without undue loss of time, although a more complete index would not have been amiss. The convenience of having the entire code in one volume compensates for its bulk. The printing is clear, and there are few typographical errors. Throughout the text at pertinent points learned comments by the editor on the comparative law involved, furnish the reader with a general view of the law in question in various codes, among various peoples, and at various times in history. Interesting side-lights on social custom are afforded in many of these notes. Concubinage as practiced by the priesthood, and ordinary *barraganía*, or union with women in a legal extra-marital relationship (pp. 31-951), the related problems of illegitimacy (p. 995), the right of asylum in a church (p. 167), the laws concerning holy pilgrimages (p. 265), the doctrine of *praesumptio juris* of the civil law in inheritance (p. 659), the laws of marriage (pp. 888, 903), impotence in marriage (pp. 914, 915), divorce (pp. 928, 929), dowry (pp. 933, 936), adultery (pp. 1418-1420), incest (p. 1422), rape (p. 1426), the sin against nature (p. 1427, 1428) are, along with other matters, the subjects of such notes.

The *Partidas* contain considerable material that is of value to the social historian which would find no place in a modern code of laws. For example, in the second *Partida* the rules governing the behavior of kings in such matters as eating, drinking, dress, and conduct are laid down, even to minute instructions as to demeanor:

"... for, in this the king should be very correct, while walking, as well as standing; also while sitting, and riding on horseback; as well as when he eats or drinks, and when he lies down, or even when he gives a reason for anything; and as to his gait, it should not be too rapid, nor should it be loitering. He should not stand long, except in church while hearing the service, or on account of something else which he cannot avoid. Moreover, it does not become him to remain for a long time in one position, or to change his seat frequently, sitting down in one place, and then in another. When he rises up, he should not appear very straight nor very bent, this also should be the case while he is on horseback; and he should not ride too fast through a town, or linger too long on the way." (p. 287).

Detailed instructions for the education of princes in moderation, elegance, and cleanliness in their table habits, and all matters of conduct are set forth. Among other things it is declared that their tutors—

"... should teach them to eat and drink in a well-bred manner, not putting a second morsel into their mouths until the

first has been swallowed: for, leaving out of consideration the ill-breeding which will result from this, there is great danger that they will be suddenly suffocated: and that they should not grasp the morsel with all five fingers of their hand, for fear they will make it too large." (p. 303).

Scattered throughout are legal conceptions of such institutions as the church in its relationship to the crown, feudalism, knighthood with its obligations and privileges, slavery, and a complete treatise on the conduct of land warfare. One of the more famous definitions is on the location of schools. It states:

"The town where it is desired to establish a school should have pure air and beautiful environs, in order that the masters who teach the sciences and the pupils who learn them may live there in health, and rest and take pleasure in the evening, when their eyes have become weary with study. It should, moreover, be well provided with bread and wine, and with good lodging houses, in which the pupils can live and pass their time without great expense. We declare that the citizens of the town where a school is situated, should carefully protect its masters and pupils and everything belonging to them. . . ."

We have here then, one of the famous and influential codes of law of the world, finally made available in its entirety in English dress. In its Spanish form it has enjoyed a prominent place on the shelves of every Hispanic lawyer and jurist in the two hemispheres. It should now find a place in the libraries of all who pretend to be more than merely journeymen lawyers in this country. All concerned are to be congratulated on the completion of this work, which should do much to promote a better understanding of our Hispanic American inheritance of our own Southwest.

ARTHUR S. AITON.

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*Criminology*. By Fred E. Haynes. New York: McGraw-Hill Book Company, Inc. 1930. pp. X, 417. —This is a text book on *Criminology*. It is based largely upon texts which have preceded this one, particular acknowledgment being paid by the author to E. H. Sutherland and J. L. Gillin. Much new material is included in the book, however, the author having made liberal use of recent crime surveys and other source material. In fact, a considerable portion of some chapters consist of abstracts of the work of other authors.

In the first chapter, entitled *Social Responsibility for Crime*, the author emphasizes the importance of methods of prevention as contrasted with the present day over-emphasis upon prosecution and punishment. He endeavors to establish the thesis that society, both by permitting environmental conditions which cause crime and then by treating adult manifestations in an unskillful manner, is increasing the crime problem rather than solving it. He adopts a behavioristic point of view, saying, "crime is conduct—such a view is destructive of the ordinary conception of crime which conceives of criminals as free willing, free acting, vicious persons, who commit their acts out of diabolical purposes." However, he completely fails to prove that the fact of crime as conduct, which may be studied in a scientific manner, is not entirely consistent with the further fact that in a good many cases it may be also a matter of free will and active choice upon the part of the individual who commits the crime.

The author deplores the present tendency to emphasize the increase in crime; he then proceeds to point out that it is impossible to tell definitely from such statistics as are available whether there has been an increase or not; he accounts for the possibility of increase by pointing out a number of present-day conditions which are calculated to increase crime; and

then seems to arrive at the conclusion that there has been actual decrease in crime.

The book is full of such strange inconsistencies. At one place the statement is made: "Early and middle adolescence is the great crime period. It is significant that the worst year in boyhood is usually the year after leaving school"; and again: "The youth of the criminals serving sentences in our prisons has deeply impressed Dean George W. Kirchwey, at one time warden at Sing Sing prison. In that prison fifty per cent. of the convicts are under twenty-five years of age and eighty per cent. are under thirty years of age. A comparatively small proportion are mature men." Then a few pages later the author, undertaking to disprove the suggestion that the tendency is toward an increase in criminality on the part of young people, concludes with the statement: "It is wild middle age then rather than wild youth."

A chapter entitled *The Scientific Study of the Criminal* is a more or less orthodox review of the theories of a group of outstanding thinkers in the field of criminology. The chapter entitled *The Individual Delinquent* is a plea for individual case study of the environmental conditions which surround the criminal, as well as of hereditary traits, and a study of the physical and psychological characteristics of the individual himself; with brief descriptions of work of this kind which is now being done in a few places.

In Chapter VI, *Criminal Law and Procedure*, the author adopts the theory of Roscoe Pound that our machinery for the administration of criminal justice, which was devised for a "homogeneous, pioneer, rural agricultural community," is not adequate for a "heterogeneous, diversified, urban, industrial community."

The work contains a brief review of procedural law without much regard to the variations which occur from state to state and which, of course, would not be noticed by one studying the problem from the point of view of a non-legally trained person. Only casual mention is made of the Code of Criminal Procedure prepared by the American Law Institute and then it is spoken of as a piece of work which will require a number of years for its completion. As a matter of fact, the Code was issued in complete form before the publication of Mr. Haynes' book.

Some attention is paid to the law relating to administration, but the author apparently has no concept of the body of substantive criminal law as distinguished from that which relates to procedure and administration. This seems most remarkable in view of the fact that sociology should be primarily concerned with the objects and purposes of the substantive criminal law, wherein we find the definition of crime generally and crimes specifically, together with the complete legal elaboration of the elements thereof. As all of these are conditioned by the sociological problems which are involved, a sociological text-writer can hardly justify his blind acceptance of a legal system which grew up in an utterly unscientific fashion before the science of sociology was born. On the other hand, the author's ignorance of substantive criminal law and what it is designed to accomplish, especially through the use of the process of judicial determination of guilt or innocence, leads him to such sophomoric superficialities as the suggestion that the whole present judicial procedure should be abolished:

"A preferable method would be to get rid of the whole contentious procedure and substitute for it a plan for the scientific determination of guilt. We have in the juvenile court and probation a model for a procedure which aims to investigate

the fact of guilt and the reasons therefor. The probation officer approaches the problem in an impartial and scientific manner. He can do everything that the defender or legal aid counsel can do; he can see that the poor person has suitable defense; he can make recommendations to the judge; he knows the environment from which the offender comes, and he knows what course of action will help him to make good if sentence is suspended. The role of the probation officer is already more widely known than that of the defender and the legal aid bureau. There is no conflict, but one tries to modify the severity of the law, while the other undertakes to introduce a new principle." (page 130.)

The chapter entitled *Juvenile Offenders* begins with a guess as to what the common law was with relation to the liability of juvenile offenders. Unfortunately, the guess is wrong in several particulars. Oddly enough, the author gives to the common law more credit than it is entitled to, for its leniency toward juvenile offenders. Again, after stating quite accurately that the establishment of the juvenile court "is one of the great contributions of the past twenty-five years to modern criminology," and pointing out the values which are involved in the increasing use of juvenile court procedure, the author begins the next page of his discussion with the sentence: "Our whole system of dealing with the youthful criminal is wrong." As already pointed out, these inconsistencies are more or less common in the book. They seem to indicate that its different parts have been written at different times and without relation one to the other.

Within the field with which he is familiar, the author has produced a very readable, useful book. His chapters on the police, penology, the jail and prison systems, prison labor, parole, probation and prevention of crime, while rather oddly arranged and organized, are rich with good material.

JUSTIN MILLER.

Duke University Law School.

*Deportation of Aliens from the United States to Europe.* By Jane Perry Clark. 1931. New York: Columbia University Press. Columbia University Studies in History, Economics and Public Law Series No. 351. Pp. 524.

*Report on the Enforcement of the Deportation Laws of the United States.* By the National Commission on Law Observance and Enforcement, Including Report of Reuben Oppenheimer on *The Administration of the Deportation Laws of the United States.* Washington: Government Printing Office. Pp. 179.

Our deportation laws—which now involve nearly 20,000 aliens per annum deported by executive action and a somewhat larger number of persons subject to deportation who are permitted annually to leave voluntarily—have at last become the subject of careful and scientific study. For many years Congress has been making these laws much more drastic, and is annually being importuned to make them still more comprehensive and unrestrained. We are at last afforded opportunities to ascertain what dispassionate and careful unbiased students regard as sound principles of policy, which ought to be underlying considerations of our legislation and administrative action, and nine members of the Wickersham commission endorse Mr. Oppenheimer's recommendations (in line with Miss Clark's observations), with only two members dissenting from some of them only.

Miss Clark, instructor in government at Barnard College and newly elected president of the Conference on Immigration Policy, has prepared our first comprehensive work on our deportation laws. It is a scientific, painstaking study, which analyzes not merely sub-

stantially all of the hundreds of reported court decisions, but embodies a study of over 600 administrative records from the files of the Immigration Bureau, 518 of which arose during the second half of 1925, and every twenty-fifth case that arose in 1930, until 50 records had been studied. The subject is treated without bias in able historical setting, with a student's determination to let the facts speak for themselves. The first section of approximately fifty pages is devoted to an introduction and a historical outline of our deportation legislation, traced back to the English pauper settlement and removal laws. Somewhat over 200 pages are next taken up with an able study of the deportation law and the interpretation of its various provisions; then about 200 pages follow, devoted to a close study of the deportation procedure, as also some 10 pages of "conclusions."

Our first general federal alien deportation law, adopted in 1891, was so badly drafted that it did not in terms provide even for an administrative hearing, and its constitutionality was sustained, in *The Japanese Immigrant Case*, 189 U. S. 86 (1903), only by reading into it implied constitutional limitations, only partially enumerated by the court. Even this loose phraseology has been retained in all the supplementary laws, which have constantly enlarged grounds and periods of permissible deportation, leaving resort necessary to departmental regulations which embrace only part even of necessary constitutional safeguards. Innumerable difficulties of construction of the laws have accordingly arisen, which Miss Clark ably grapples with, and for the first time permits even the general student of law to unravel. Her work is accordingly of great practical value, as well as an important contribution to the literature of administrative law and the rights of aliens.

Mr. Oppenheimer's study is admittedly more critical. He also had access to a large number of administrative records, in addition to those found in judicial determinations, concerning the rights of aliens and analogous judicial rulings. He selected as illustrative of administrative action every twentieth (later every fifteenth) departmental ruling made during the fiscal year ending June 30, 1929, besides personal investigation and court decisions. An enormous amount of new light has been thrown by him on the problems in question, involving so much that is vital for the alien, and he describes his inquiry not merely as relating to the "effectiveness" of the law, but also as to its "fairness." Thus he points out that in only about one-sixth of the cases has the alien-respondent adequate means to retain counsel, though the inspectors, appointed without any character investigation, have as their primary interest to report as many aliens as possible. The inspector's recommendations are followed in 95% of the cases by the secretary of labor, really acting through a non-statutory "board of review." Only 15% of the respondents are able to furnish the usual \$250 bail, and 10% more are released on their own recognizance, the rest remaining throughout the hearing helpless in custody, commonly in jail, for from a few weeks to three or four months. In 85% of the cases where there is no attorney, deportation is recommended, but only in 70% of the cases where there is such adviser. In 1930 only 56 aliens secured release from warrants of deportation by habeas corpus, about 1/6 of the number that sought the limited review our laws thus authorized in such class of cases, being only about 3/10 of one per cent of the number deported that year.

Mr. Oppenheimer criticizes the commonly prevailing practice of questioning the aliens without warning

and in the absence of counsel, and the recently adopted wholesale raids without warrants of arrest or search. The absence of all discretion, even in the secretary and the president, to withhold deportation where a case is established, is deprecated, despite frequent trivial grounds involved and grave resulting separation of families, and the absence of any statute of limitations as to nearly all entries since the Act of 1924.

The chief recommendations are that the department of labor be confined to investigation, prosecution, and execution of warrants, and the creation of an independent "board of alien appeals" is urged, to hear the cases, members of which are to be named by the president, with publicity for their findings; also raising the caliber of immigrant inspectors, and instructing them to observe constitutional rights and elementary principles of fairness, and discretionary power is sought to be vested in this new proposed tribunal to remit deportation. More co-operation between state and federal officials is urged, especially as regards criminal aliens; and promotion of furnishing of counsel, partly through co-operation with legal aid and related immigrant aid organizations. Prohibition of deportation of aliens to countries where their political opinions endanger their lives is also urged, and strengthening of agencies for prevention of unlawful entry. It is a marked tribute to Mr. Oppenheimer's persuasiveness and forceful presentation that his recommendations have been approved by so large a majority of the commission, in whose report it is stated that the joinder of the functions of detective, prosecutor and judge, encountered in the immigration inspectors, has not been found safe in any other phase of life. The commission also says: "The most temporary resident of the United States, owing allegiance to another government, is, while he is on our soil, given the equal protection of our laws, and it is not consistent with the spirit of our institutions or the express language of our bills of rights to deny the substance of these guarantees to resident aliens, either directly or indirectly, by adopting processes for their assurance which in effect diminish their efficacy to classes of persons not classified by the Constitution itself." Just before these words were penned, Judge Denison, speaking for the circuit court of appeals, in *Browne vs. Zurbrich*, 45 F. (2nd) 931 (1930), pointed out that "during a long period, with reference to immigration and exclusion acts, a course of judicial construction developed, approving, or rather condoning, great laxity in the preservation to an alien of rights which in the case of a citizen would be considered essential to due process of law," and he stated that in view of recent acts making a deportee forever ineligible for re-admission and return a felony, and resulting separation of families and human woe, the question whether "the courts will construe more liberally the due process rights of a resident alien" is one "that will eventually call for consideration." Some of Mr. Oppenheimer's recommendations are similar to those contained in the report of the United States immigration commission, prepared as far back as 1910.

MAX J. KOHLER

New York City

*Judicial Interpretation of International Law in the United States.* By Charles Pergler. 1928. New York: The Macmillan Company. Pp. VIII, 222.—Such is the rather cumbersome title of a work by a former Czecho-Slovakian deputy and minister to Japan. The publication itself marks a recognition of the growing

importance of the case law in the international field. Nearly a decade ago, in a treatise (*Corpus Juris XXXIII*, 391), which Dr. Pergler seems to have followed somewhat in arrangement and material, the present writer called attention to the fact that "judicial decisions afford an important and growing source of International law; for, as in the corresponding case of the common law, they are not only binding in the jurisdiction where they are rendered, but are usually followed elsewhere." We have only to recall the already long and increasing list of "case books" on International Law, which have appeared within less than half a century, to realize how large a part in that subject, adjudicated precedents have come to play. Thus we have: 1885, Pitt Cobbett (5th ed. 1931); 1893, Snow (Freeman); 1902, Scott (James Brown) 2d ed. 1922; 1913, Bentwich (Norman); 1916, Stowell & Munro; 1917, Evans (Lawrence B.) (2d ed. 1922); 1927, Dickinson (E. D.); 1929, Hudson, (Manley O.). Dr. Pergler seems to have been quite justified, therefore, in believing that the time had come for an international law textbook based on judicial decisions. In his preface he states:

"The plan originally was to limit the survey to decisions of the United States Supreme Court, and, on the whole, this intention has been adhered to. It was found, however, that certain questions of International Law have never been presented to the highest American judicial tribunal and therefore a number of decisions of state courts of last resort, as well as of the lower Federal courts, have been cited. For similar reasons, reference is also made to several general works on International Law by standard writers."

These decisions of state and lower federal courts are quite within the purview of Dr. Pergler's title. Unfortunately the latter's delimitations excluded his consideration of the growing body of international case law which has already accumulated in other countries, the numerous and extensive report of international commissions, including the old Hague Tribunal, and last, but not least, the rapidly developing volume of decisions (see Hudson, *The World Court*, 1922-1928, 11 seq.) by the Permanent Court of International Justice. With such a wealth of adjudicated material international law writers, teachers and students need no longer rely large if at all upon the opinions of authors or even upon the utterances of those temporarily in charge of the foreign offices. For there is a more authoritative source and Dr. Pergler has rendered a real service in helping to make it available.

It has long been the attitude of the practicing lawyer that so called international law is not law at all because it lacks the usual sanctions and an authoritative utterance. But this attitude must inevitably yield before a showing of judicial interpretation as extensive as this work contains limited as it is to the United States. Nor need the teaching of international law longer be relegated to those who are not lawyers and whose conception of it is rather that of "international relations" or "diplomatic history" than of law. With case books and treatises confined mainly to judicial interpretation, instruction in this, as in any other, legal subject calls for those who are trained to interpret decisions and to impart knowledge thereof in the light of its relation to the entire legal field of which it forms a part.

The earliest writers upon what was then called the "law of nations," dwelt mainly upon war. Even in the great work of Grotius—*De Jure Belli ac Pacis*—there was far more *belli* than *pacis*. It well illustrates the changed scope of the subject that Dr. Pergler does not

attempt to discuss either war or neutrality. His six chapters treat of: I, Acceptance and Enforcement; II, Independence and Sovereignty; III, Jurisdiction of States; IV, Citizenship and Alienage [really a branch of internal rather than of international law]; V, Treaties; VI, Non-belligerent Remedies. There is a bibliography of 2½ pages (which however does not refer specifically to certain works extensively used), a table of cases and an index of 9 pages. The name of the Macmillan Company as publisher is a guaranty of typographical merit and altogether the book is a welcome contribution to a still neglected phase of international law literature.

CHARLES S. LOBINGIER

Washington, D. C.

*Constitutional Law: An Outline of the Law and Practice of the Constitution, Including English Local Government, the Constitutional Relations of the British Empire and the Church of England.* By E. C. S. Wade and G. G. Phillips. 1931. New York: Longmans Green & Co. Pp. xxii, 476.—A new scholarly text-book and manual of English constitutional law was long overdue. All the older books—to mention them specifically would be invidious—were either out of date or had not been improved in the hands of editors. They were as a general rule too factual, aiming too much at information for examination or ready reference. Dicey perhaps alone was a brilliant exception; but his *Law of the Constitution* has in many respects had its day. It can now take its place in the honored company of Bagehot, and even there, where it will have a permanent historical position which no student can afford to neglect, it will be read with caution because of its somewhere crude political and legal philosophy and for a certain lack of balance in emphasis.

Let it be said at once, then, that the learned authors of this book have placed all students of English constitutional law under obligations to them. In taking advantage of the necessity for a modern work they have not only superseded the older texts, but have also written with a fine sense of values and of the changes and rumors of change which are evident in English constitutional law. Structure is not indeed neglected; but the emphasis throughout is on function, without, however, losing general legal principles amid the manifold details which characterize the activities of the central and local authorities. Of great interest, too, is the scheme of the book. The learned authors first discuss the nature and sources of constitutional law and the general principles of the constitution. From these they pass to greater detail, surveying in turn parliament, the executive, the judiciary, local government, the citizen and the state, the forces of the crown, the British Commonwealth, church and state. In each of these divisions, learning, accurate knowledge of the law, insight, critical and analytical power and suggestive political knowledge combine to make the entire scheme of the book singularly attractive. The references are, on the whole, full. The notes are good. The tables of cases and statistics and the index are excellent and facilitate reference in every respect. We believe that the book will at once take its place among students and the profession as the best available work of its nature.

In a new edition there are some points which, we respectfully submit, need attention. Statutes ought to be quoted in the usual manner and not merely by their short title. There is a loose reference to the Senate of the United States, which is never "dissolved" (p. 40.)

We respectfully submit that the difficulties connected with the referendum in Australian constitutional law are due to the peculiar law in that connection (p. 59.) The statement for which *Walker v. Baird* [1892] A. C. 491 is given as a reference is not supported by that case (p. 62;) and the authors recognize this by noticing (p. 781) that the judicial committee refused to decide the point. The reference to *Dickinson v. De Sopar* [1930] 1 K. B. 376 ought to be brought into line with what Lord Hewart actually said. We respectfully submit that the references to Magna Carta (pp. 86, 286) are not in keeping with modern scholarship. And the same might be said of the coronation oath (p. 152.) In discussing "freedom of public meeting," the learned authors disclose admirable balance. We believe, however, that in referring to *Beatty v. Gubanks* (1882) 9 Q. B. D. 308, it is always well to point out that that case in reality turned on the evidence and that Cave, J. (15 Cox C. C. 138) gave a separate opinion (pp. 307-8.) *Wise v. Dunning* [1902] 1 K. B. 167 (p. 308) ought to be referenced to *Lansbury v. Riley* [1914] 3 K. B. 229. We miss, in the discussion of military law and courts-martial, a reference to the important case of *Heddon v. Evans* (1919) 35 T. L. R. 642. The section on the British Commonwealth is excellent in tone and dignified in both treatment and approach. It is, however, disfigured by several grave errors of fact. Indeed these chapters need a thorough revision under experienced guidance. In a new edition reference must be made to the announcement of March 27, 1931, that a new seal will be used in place of the Great Seal in relation to international agreements to which the Irish Free State will be a party. This arrangement would seem to point to a personal union between the Free State and the United Kingdom and to modify, if not to destroy, the doctrine of *Williams v. Howarth* [1905] A. C. 551 (p. 362.) Is it correct to say that the mandates are entrusted by the League of Nations to "the British Crown" (p. 371)?

I draw attention to these points with some hesitation, as the volume is so excellent in its conception, treatment and proportions. But some recent contributions to constitutional law have been so mediocre and unreliable that it is well that a book of such value should be freed in new editions, from whatever blemishes it may contain. We congratulate the learned authors on the provision of this long-wanted text.

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## Leading Articles in Current Legal Periodicals

*Virginia Law Review*, March (University, Va.)—The Supreme Court and State Police Power, 1922-1930, by Thomas Reed Powell; Federal Jurisdiction in Suits by Trustees in Bankruptcy as Affected by the Consent of the Defendant under Section 23 (b) of the Bankruptcy Act, by Harter F. Wright; Newspaper Copyright, by Joseph M. Cormack.

*Georgetown Law Journal*, March (Washington, D. C.)—Shakespeare's Will, by A. Wigfall Green; The Naval Reserve Leases, by Charles G. Hagland; Limiting the Plea of Self-Incrimination and the Recent New York Immunity Statutes, by Max P. Rapacz.

*North Carolina Law Review*, February (Chapel Hill, N. C.)—The Law School as a Function of the University, by John Hanna; Picketing Legislation and the Courts, by Jerome R. Hellerstein.

*California Law Review*, March (Berkeley, Calif.)—Workable Rules for Determining Proximate Cause—I, by Charles E. Carpenter; Las Siete Partidas, by Madaline W. Nichols;

California Legislation in 1931: A Review, by Thomas S. Dabagh, Fred B. Wood.

*Yale Law Journal*, March (New Haven, Conn.)—The Acceleration of Future Interests, by Lewis M. Simes; Inquisitorial Functions of Grand Juries, by George H. Dession and Isadore H. Cohen; The Nature of the Doctrinal Function and Its Role in Rational Thought, by Cassius J. Keyser.

*Notre Dame Lawyer*, March (Notre Dame, Ind.)—The Lawyer and the Public, by Thomas F. Konop; Delay in the Administration of Justice, by William M. Cain; Infants' Liability—When Not Liable, by Leo Orvine McCabe; The Early Supreme Court of the United States, by Edward Carey Cohen; Lincoln's Early Impressions of Indiana Law, by James M. Ogden; Nullification—A Slogan or a Process of Government, by Forrest Revere Black; Motions to Make Complaints More Specific in Motor Vehicle Negligence Cases, by Clifford V. DuComb; Public Purpose in the Right to Tax, by Julius R. Bell.

*Columbia Law Review*, March (New York City)—Liability in New York for the Physical Consequences of Emotional Disturbances, by Francis H. Bohlen, Harry Polikoff; The Wisconsin Unemployment Compensation Act, by J. Mark Jacobson; The Taxation of American Business in France, by Milton Newman, Cesar Eram.

*Iowa Law Review*, March (Iowa City, Ia.)—The Minority Stockholder and Intra-corporate Conflict, by Norman D. Latfin; Commentary on the Iowa Workmen's Compensation Act—II, by Maurice H. Merrill; Preparatory Work in the Interpretation of Treaties—II, by Robert W. Miller; Right to Tax and to Take by Eminent Domain in the Construction of Public Buildings, by Julius R. Bell.

*Tennessee Law Review*, December (Knoxville, Tenn.)—Layman's Complaint—Is It Justified? by Estes Kefauver; Appellate Jurisdiction and Procedure, by Joseph Higgins; Procedure in Rate Adjustments before State Commissions, by Nathaniel T. Guernsey.

*Tennessee Law Review*, February (Knoxville, Tenn.)—History of Codification in Tennessee, by Samuel C. Williams; Changing Concepts of a Lawyer's Preparation, by Will Shafroth; Liability of Drawee on Altered Instrument, by E. W. Beasley.

*American Journal of Police Science*, January-February (Chicago)—The Murder of Blackie Atkins, by J. H. Mathews; The Preliminary Identification of Fired Bullets, by Seth Ward; The Campbell Case, by Newman F. Baker; Selected Decisions, by O. C. Knudsen and A. O. Hoffman; A Process of "Moulage" for Reproducing Marks Indicative of Forcible Entry and Molding Those Left by Tools, by E. Goddefroy; Rex vs. Mike Hack—Handwriting in a Murder Trial in Western Canada, by Herbert J. Walter; Concerning Quicklime Burial, by J. D. Laudermilk; Police Training in College and University, by George H. Brereton; Pistol Regulation: Its Principles and History, by Karl T. Frederick, Part II; The Literature of Gunshot Injuries, by Allen Pennell Westcott.

*Canadian Bar Review*, March (Toronto)—Servants of the Crown, by Nigel B. Tennant; Protection of Property Interests in Equity, by John H. Robinette; Uniformity of Merchant Shipping Legislation and Admiralty Jurisdiction Throughout the British Empire, by Charles J. Burchell; The Centenary of Osgoode Hall.

*Dickinson Law Review*, March (Carlisle, Pa.)—Judge Wilbur Fisk Sadler—Justice John W. Kephart; William Trickett—Clarence Balentine; Title Acquired by Purchaser of Negotiable Bill of Lading, by Joseph P. McKeehan.

*Kentucky Law Journal*, March (Lexington, Ky.)—State Rate Regulation and the Supreme Court, 1922-1930, by Thomas Reed Powell; Taxation of Oil and Gas Interests, by Charles Gustav Haglund; The Doctrine of Judicial Review, by F. R. Aumann; The Kentucky Rule of Damages for Breach of Executory Contracts to Convey Realty, by Mendell Carnahan.

*United States Law Review*, March (New York City)—Federal Regulation of Electric Utilities, by Ben A. Arneson; The Unemployed in Legal History; Liability of Trustee for the Dishonesty of His Employee or Agent, by Albert Hirst.

*Journal of Criminal Law and Criminology*, March (Chicago)—Administration of Law Among the Chinese in Chicago, by Chu Chai; Mental Hygiene and Law, by Clara Bassett; The Organization of a Course of Study in Criminal Law, by Newman F. Baker; Reliability of Factors Used in Predicting Success or Failure in Parole, by Clark Tibbitts; The Search for Causes of Crime, by Nathaniel Cantor; Contribution of Social Work to Parole Preparation, by Ruth E. Collins; The Problem of Punishment in Germany, by Werner Gentz.

*University of Cincinnati Law Review*, March (Cincinnati)—Warranties in Building Contracts, by Morris Berick; The Modern Expansion of the Roman Law, by Charles Sumner Lobingier.

*Harvard Law Review*, March (Cambridge, Mass.)—The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock, by Charles L. B. Lowndes; Judicial Relief for Peril and Insecurity, by Edwin M. Borchard; The Interstate Commerce Commission and Interstate Railroad Reorganizations, by Nathan L. Jacobs.

*Law Notes*, March (Northport, N. Y.)—Libeling the Dead, by Arthur B. Shepherd; Extra Compensation for the Expert Witness, by Berto Rogers; Effect of Divorce Decree on Prior Separation Agreement, by Carl V. Venters.

*Law Notes*, April (Northport, N. Y.)—The Chinese Civil Code, by Walter A. Shumaker; Trustees and Falling Markets, by Ralph Straub; Duty of the Crossing Pedestrian, by Berto Rogers; Compensation for Injury to Workman's Artificial Member, by C. S. Wheatley, Jr.

*University of Pennsylvania Law Review*, April (Philadelphia, Pa.)—Mr. Justice Brandeis and the Constitution, by Alpheus T. Mason; Rationale of the Rule That an Obligor's Premature Payment Discharges His Surety, by H. W. Arant; Foreign Principals, by Hugh J. Fegan.

*Temple Law Quarterly*, April (Philadelphia)—Letters from a Preceptor to a Law Student, Anonymous; The Application of the "Theory of Relativity" to Law (I), by Mark M. Litchman; Court and Counsel, by John H. Denison; The Doctrine of Frustration or Implied Condition in the Law of Contracts, by Jay Leo Rothschild; Compound Interest and the Law, by Hiram L. Jome; Res Ipsa Loquitur, by John E. Hannigan; The Right to a Public Trial, by Max Radin.

*The Journal of Air Law*, April (Chicago)—Federal and State Control of Air Carriers by Certificates of Convenience and Necessity, by Mabel Walker Willebrandt; The Organization and Program of the International Commission for Air Navigation (C. I. N. A.), by Albert Roper; The Proposed Federal Merchant Airship Act and Its Comparison with the Existing Maryland Act, by Edgar Allan Poe, Jr.; Regulation of Aircraft as Common Carriers, by Irwin S. Rosenbaum; Unobstructed Airport Approaches, by Sheldon D. Elliott; Certificates of Convenience for Airport Transport, by Fred D. Fagg, Jr., and Abraham Fishman.

*Illinois Law Review*, April (Chicago)—Bases of Construction of Systems of Legal Analysis, by Raymond J. Heilman; Restatement of the Law of Contracts—Illinois Annotations, by Harold W. Holt.

*Tulane Law Review*, April (New Orleans, La.)—Liability without Fault, by Rufus C. Harris; Civil Law Influences upon the Law of Insurance in Louisiana, by Eugene A. Nabors; The Crime of Desertion and the Execution of Foreign Decrees for Support, by J. L. Eggen van Terlan.

*Wisconsin Law Review*, April (Madison, Wis.)—A Letter from the Dean Elect, by Lloyd K. Garrison; Wisconsin Legislation—Special Session 1931, by John B. Sanborn; Wisconsin Unemployment Reserves and Compensation Act, by Elizabeth Brandeis and Paul Raushenbush; Compulsory Unemployment Insurance and Due Process of Law, by Miles Lambert; Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part II, by Richard V. Campbell.

*Texas Law Review*, April (Austin, Tex.)—Attacking Credibility of Witnesses by Proof of Charge or Conviction of Crime, by H. Grady Chandler; The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, by A. W. Walker, Jr.

*Minnesota Law Review*, April (Minneapolis, Minn.)—Control of Public Utilities in Minnesota, by Frank William Hanft.

*Marquette Law Review*, February (Milwaukee, Wis.)—The Enforcement of Personal and Real Property Taxes in Wisconsin, by Claude D. Stout; Interpretation of Law, by Gilbert E. Brach; The District Attorney as Criminologist, by Edward L. Miloslavich, M. D.

*Michigan State Bar Journal*, February (Ann Arbor, Mich.)—Our Prison Population, by Paul W. Voorhies; The Assignment of Trade Marks and Trade Names, by Grover C. Grismore; Insolvency Statutes Preferring Wages Due Employees, by Paul G. Kauper; The Constitution and the International Labor Conventions, by Harold W. Stoke; Civil Pleading in Scotland—Part I, by Robert Wyness Millar.

# OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

*The Association publishes the previous Opinions of the Committee in book form. They can be obtained at 25 cents per copy by addressing Executive Secretary, American Bar Association, 1140 N. Dearborn Street, Chicago, Ill.*

## Opinion 49

(December 12, 1931)

**Employment**—An attorney cannot properly accept employment in connection with any matter involving the same facts as were involved in litigation in which he acted as a special master.

**Employment**—A law firm cannot properly accept any employment which one of its partners cannot properly accept.

**Impropriety**—An attorney should not only avoid impropriety but should avoid the appearance of impropriety.

C and S both claimed the oil produced from a small strip of land and the dispute led to a lawsuit. Each owned a valid oil and gas lease and each claimed that the strip of land in controversy, although not specifically described therein, was nevertheless covered by its lease. L, a lawyer, heard the case as Special Master and found for C. The court rendered judgment against S upon L's report and S thereupon appealed to a higher court, where the case is now pending.

The oil produced from this land was run by D, who is holding the proceeds intact until the litigation between C and S is finally determined. There is no controversy over the amount or the value of the oil run by D. D was not a party to the suit. No question was raised in the suit as to D's liability for the proceeds of the oil, which he stands ready to pay to the party the court holds to be entitled thereto. In order to protect such rights as it may have, at the conclusion of the pending litigation, S desires to begin action therefor against D for the proceeds of the oil before such action becomes barred by the statutes of limitation.

S desires to employ the firm of attorneys of which L is a member to bring this suit. A member of that firm, who is a member of this Association, asks the committee to determine whether it can properly accept such employment.

The committee's opinion was stated by MR. HOWE, Messrs. Hinkley, Harris, Gallert and Carney concurring.

The first paragraph of Canon 36 reads as follows:

"A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity."

Until the appeal from the judgment in C's favor is finally determined, S's claim to ownership of the oil rights to the land from which the oil was run, must necessarily be an issue in any action which S may bring against D for the proceeds of the oil. This is a matter upon the merits of which L acted in a judicial capacity when, as a Special Master, he made a report in the litigation between C and S. He is, therefore, precluded from accepting employment to handle any matter in which S's ownership of the oil rights in question will become an issue.

Even if the suit against D is not brought until after the appeal is finally determined in S's favor, our

conclusion respecting the propriety of L's acceptance of employment must remain the same. Though one of the parties would be different such a suit might involve many of the same facts as were involved in the question which L passed upon in connection with the litigation between C and S. As D was not a party to that litigation, he is not estopped from denying S's asserted ownership of the oil rights to the land in question.

Underlying these conclusions is the necessity for the maintenance of public confidence in the integrity of the profession. Canon 36 is divided into two paragraphs, the first applying to lawyers who have acted in a judicial capacity and the second to those who have held public office or been in public employ. In Opinion 26, we stated that the second paragraph of the canon:

"was intended to forbid a lawyer accepting private legal employment in any matter involving the same facts as were involved in any specific question which he had previously investigated while in public office or public employ," and, in Opinion 39, when referring to Opinion 26, we stated that:

"The basis of this decision was that as a public legal official he was acting for the state, and he should not later accept any private employment in the same matter (whether for or against his former opinion or position), on account of the manifest possibility that his action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or upset what he had done."

Both paragraphs of Canon 36 are based upon the necessity for the maintenance of professional integrity and for the maintenance of public confidence in that integrity. A lawyer who has previously occupied a judicial position or acted in a judicial capacity should refrain from accepting employment in any matter involving the same facts as were involved in any specific question which he acted upon in a judicial capacity and, for the same reasons, should also refrain from accepting any employment which might reasonably appear to involve the same facts. If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness it must not only avoid all evil but must likewise avoid the appearance of evil.

The relations of partners in a law firm are such that neither the firm, nor any member nor associate thereof, may properly accept any professional employment which any member of the firm cannot properly accept. *Opinion 33.*

## Opinion 50

(December 14, 1931)

**Employment**—An attorney cannot properly accept employment in connection with a case if he knows that he or his partner will be an essential witness.

**Trial Counsel**—An attorney cannot properly continue in a case as trial counsel after he learns that he or his partner will be an essential witness.

**Witness**—An attorney, after learning that he or his partner will be a material witness, cannot properly continue in a case as trial counsel.

**Impropriety**—An attorney should not only avoid impropriety but should avoid the appearance of impropriety.

**Employment**—A law firm cannot properly accept or continue in any employment which one of its partners cannot accept or continue in.

A member asks whether it is proper for a lawyer to conduct the trial of a will case in which his partner is a material witness in regard to the mental competency of the testator at the time of the execution of the will.

The Committee's opinion was stated by MR. HOWE, Messrs. Hinkley, Harris, Gallert and Carney concurring.

Our courts generally hold that, in the absence of any statute to the contrary, the testimony of an attorney for his client is competent and the fact that he is or has been an attorney in the case affects only his credibility. At the same time they condemn the practice as one that should be discouraged, holding that it is a breach of the rules of professional conduct for an attorney to accept employment in any matter in which he knows that he will be a material witness for the party seeking to employ him or, having accepted employment, for him to testify for his client except in those rare cases where, from some unforeseen event occurring in the progress of a trial, his testimony becomes indispensable to prevent an injustice. *Frear vs. Drinker*, 8 Pa. 52; *Kaesser vs. Bloomer*, 85 Conn. 209, 82 Atl. 112; *Onstott vs. Edel*, 232 Ill. 201, 83 N. E. 854; *Connolly vs. Straw*, 53 Wis. 645; 11 N. W. 17; *Flood vs. Bollincier (Iowa)*, 138 N. W. 1102.

Canon 19, states that a lawyer should not testify for his client "except when essential to the ends of justice." A lawyer cannot therefore properly accept employment in any matter in which he knows, or has reason to believe, his testimony will be essential to the prospective client's case. An attorney who accepted employment under such circumstances would find it difficult to disassociate his relations to the client as a lawyer and his relations to the litigant as a witness. *Roy vs. First Nat. Bank of Monroe*, 183 Wis. 10; 197 N. W. 237. Even if he actually could do so, the dual relationship would invoke embarrassing criticism. Although his zeal as a lawyer might not influence his testimony as a witness, an ever critical public is only too apt to place such a construction upon it. A lawyer should not only avoid all improper relationship but should likewise, in order to maintain the profession in public confidence and esteem, avoid all relationships which may appear to be improper. *Opinion 49 supra*.

A lawyer, having accepted employment in ignorance of any fact which would indicate that his testimony might become indispensable to his client's cause, should not act as trial counsel after learning that he may be a witness as to other than formal matters. Whether, under such circumstances, he should immediately withdraw from all connection with the case must depend on whether he can do so without jeopardizing his client's interests. Professional honor and self respect require that he retire from the case as soon as it is safe for him to do so. *McLaren vs. Gillespie*, 19 Utah 137, 56 Pac. 680; *Glanz vs. Ziabek*, 233 Ill. 22, 84 N. E. 36.

In Opinion 33 we held that "the relations of partners in a law firm are so close that the firm, and all members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking." As the lawyer cannot properly accept employment in any matter in which he knows he will be a material witness for the party seeking to employ him, his partner cannot properly accept employment from that party. Likewise, anything which

requires a lawyer to withdraw from a case likewise requires that his partners withdraw.

### Opinion 51

(December 13, 1931)

**Purchase of Choses in Action**—Improper for an attorney to purchase them for the purpose of collecting them at a profit.

A member of the Association states that it has come to his attention that certain lawyers make a practice of buying judgments, notes and other choses in action from bankrupt estates for much less than their face value and of collecting them then at large profit to themselves. He desires to know whether it is proper for an attorney to purchase a judgment, note, or other chose in action for less than its face value, with the intent of collecting it at a profit to himself.

The Committee's opinion was stated by MR. HARRIS, Messrs. Howe, Hinkley, Gallert and Carney concurring.

We are of the opinion that this practice is improper. It seems clear to us that such a course of conduct is violative of both the letter and spirit of Canon 28, which forbids lawyers to stir up strife and litigation. This opinion, it may be claimed, bars attorneys from entering a speculative field, which might be profitable and which is open to laymen; nevertheless, we feel that the dignity of the profession, as well as the ethics of the situation, are entirely consonant with the view herein expressed.

### Opinion 52

(December 13, 1931)

**Judicial Ethics**—Improper for a judge to conduct, for a daily newspaper, a column of comment on current news items and matters of general interest.

Attention is called to the conduct of a judge who conducts a column in one of the leading newspapers of a metropolitan city. His name appears at the head of the column with the prefix of an office, non-judicial in character, which he previously held, but without any statement as to his judicial position. The range of these articles is unlimited and, at times, includes political and other controversial subjects. They are of such a nature that their preparation must necessarily require very considerable time and study for which the writer should receive substantial remuneration. The statutes of the state forbid any practice of law by a judge other than that which is necessary to the completion of the cases which he has pending at the time he assumes his judicial duties, but are silent as to whether he should give all of his time to his judicial position. There is no precedent for such action as no other case is known of a judge in the city accepting other employment while holding judicial office.

Many members of the Bar of the city object to this activity of the judge, feeling that it is interfering with the full and complete attention which he should give to his judicial duties. A committee of the bar association of the city requests us to express our opinion as to the propriety of the judge's conduct.

References: Canons 4, 8, 24 and 34 of Judicial Ethics.

The Committee's opinion was stated by MR. HINKLEY, Messrs. Howe, Harris, Gallert, Strother and Carney concurring.

The conducting of such a newspaper column by a judge is not in accord with the standards prescribed

in the Canons of Judicial Ethics. There are many things which involve no wrong doing and would not be considered as subject to criticism in the case of a lawyer, but are derogatory to the dignity of a judge. Canon 4 of the Canons of Judicial Ethics, entitled "Avoidance of Impropriety," contains the statement: "and his personal behavior, not only upon the Bench and in the performance of his judicial duties, but also in his every day life, should be beyond reproach."

Canon 24 states that "he should not accept inconsistent duties" and Canon 34 repeats the statement that "his conduct should be above reproach." The last paragraph of Canon 31 reads as follows:

"He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law."

This does not extend to the outside activities stated in the question.

It is quite evident from the question that extra-judicial discussions in print are viewed with disfavor by many people, which is sufficient to bring them within the Canons quoted. It is not at all unlikely that such outside activity might lead, or might be thought to lead, to impairment of judicial efficiency. Another aspect of the question is that the public expression of views may influence a judge's decisions on the bench, which may involve the decision of political or economic questions which he has publicly discussed in print.

We think, therefore, that it is not appropriate for one holding judicial office to conduct such a newspaper column.

### Opinion 53

(December 13, 1931)

**Advertising—Publication of a lawyer's name in a classified telephone directory in a distinctive manner, such as bold face type, is a form of advertising.**

**Advertising—The insertion of a lawyer's name in a telephone directory under a number of varied headings is a form of advertising.**

It has become customary for the telephone companies in our largest cities to continue the publication of the alphabetical directories only, relinquishing the publication of *classified* telephone directories to a publishing concern which publishes them for profit. This concern endeavors to supplement its income from the usual types of advertising which these directories contain, by other methods. It publishes the name of each telephone subscriber free but charges for the listing of each additional name, such as the names of the individuals composing a firm of lawyers and of such of their associates and employees as they desire to have listed.

One of the methods of securing additional income is to solicit telephone subscribers to have their names and their additional listings published in larger or more conspicuous type, sometimes referred to as bold face type, for which a substantial charge is made. Another recent method is the classification of lawyers into many different classes, practically all of which fall within the realm of general practice, so that if a lawyer in general practice desires to have his name appear in all the classifications where it might properly appear, he must pay a considerable sum therefor.

Heretofore, the publication of a lawyer's name in a classified directory has supposedly been justified as being a convenience for those desiring to find his address or telephone number, but this publishing concern

now solicits the publication of lawyers' names under many classifications for the avowed purpose of supposedly securing additional business for him. Its letter of solicitation reads as follows:

"We wish to call your attention to a change in the next issue of the *Red Book* . . . Classified Telephone Directory.

"The legal profession has its specialists like medicine and engineering, and frequently the public does not know who to consult with its important legal problems. One of the most feasible ways of informing prospective clients is through the Classified Telephone Directory.

"In order to furnish this service to the public we are adding classifications which will enable you to designate your specialty by listing your name, address and telephone number under any of the following headings:

Lawyers—Admiralty	Lawyers—Insurance
Lawyers—Bankruptcy	Lawyers—Pension
Lawyers—Claim	Lawyers—Personal Injury
Lawyers—Collection	Lawyers—Surrogate
Lawyers—Copyright	Lawyers—Real Estate
Lawyers—Corporation Law	Lawyers—Title
Lawyers—Criminal Law	Lawyers—Trade Mark
Lawyers—Damage Suit	Lawyers—Workmen's Compensation
Lawyers—Income tax	

"This will permit you to furnish special information without bringing into it any phase of advertising. A study of this change in other cities has proved its value both to the public and to the profession.

"The cost of listing is small. If you are interested in being identified under any of the above classifications, we shall be pleased to furnish you with complete information upon return of the enclosed card."

Conflicting views as to the propriety of such publication of a lawyer's name have brought requests for an expression of our opinion:

1. As to whether a lawyer may properly cause the publishers of a classified telephone directory to publish his name in such directory in type of a larger or more conspicuous nature than that which would be used if he did not pay therefor.

2. As to whether a lawyer may properly cause his name to be inserted in a classified telephone directory under any classification or heading other than the general classification used to designate the profession, such as "lawyers" or "attorneys."

The Committee's opinion was stated by Mr. HOWE, Messrs. Hinkley, Harris, Gallert, Strother and Carney concurring.

As a matter of public convenience, it is desirable that a lawyer have his name listed in the classified telephone directory which the telephone companies authorize. So long as the lawyer's name is listed in such a directory in the usual manner and in the same style and size of type as other names are listed, such listing is not advertising, as there is nothing which will particularly distinguish the name of one lawyer from that of another. Payment for listing of this nature does not alter its character or carry any implications of impropriety. A lawyer who is not a telephone subscriber, but who uses the telephone of the firm with which he is connected or the telephone of some other subscriber, must usually pay for the listing of his name in telephone directories.

The listing of a lawyer's name in such a directory assumes quite a different character when he pays for having his name published in type of a different style or size from that in which the names of other lawyers are listed. In that event it becomes a form of advertising and a lawyer's conduct in causing it to be so published must be condemned. (*Opinion 43.*)

For similar reasons, we must disapprove the insertion of a lawyer's name in such directories under various headings. The very purpose of inserting a lawyer's name under these many headings is, as the publisher states in the letter which is quoted in the

question, that of "informing prospective clients" that the lawyer desires their business. Therefore, the lawyer who causes his name to be thus inserted is advertising for professional employment. Those who desire to find a lawyer's telephone number or address in a classified telephone directory, will be fully accommodated by its insertion under the general heading which the publishers use to designate the profession.

#### Opinion 54

(December 14, 1931)

**Announcements—Impropriety of announcing a layman's association with a lawyer's office.**

**Solicitation—The circulation of an announcement that a layman is in charge of a portion of a lawyer's professional activities is a form of solicitation.**

**Relationship with Lay Associate—The announcement that a lay associate is conducting any part of a lawyer's professional activities indicates an improper relationship.**

May a lawyer properly send out an announcement which, in effect, reads as follows: "John Doe wishes to announce that Richard Roe has become associated with his office and will hereafter have charge of all collection matters," the said Richard Roe not being admitted to the practice of the law.

The Committee's opinion was stated by MR. HARRIS, Messrs. Howe, Hinkley, Gallert, Strother and Carney concurring.

Various considerations require that this question be answered in the negative. In the first place, the language of the announcement would reasonably be construed as misrepresenting the lay associate to be a member of the bar. Secondly, the circulation of such a notice is clearly an advertisement, designed to increase the volume of collection work to be done in John Doe's office, and is contrary to both the letter and spirit of Canon 27. Further, the use of the name of a layman on the stationery of a lawyer, representing the former as conducting or managing a department of a lawyer's professional activities, is improper because it too readily lends itself to the solicitation of employment or the use of it for advertising purposes by the layman so employed.

The relationship indicated in the announcement is clearly contrary to the spirit of the last sentence of Canon 33, because the same rule that applies to partnerships applies to an association of the character indicated in the announcement.

Mr. Gallert, concurring:

Although I do not agree with all of the views expressed in the above Opinion, I concur in the result, inasmuch as Canon 27 forbids a lawyer sending any notice relating to his practice to any persons other than those with whom he has had previous personal relations, and also because it is improper for a lawyer to send out to those with whom he has had such previous relations, a notice which is deceptive or even ambiguous.

#### Opinion 55

**Judicial Ethics—Under Canon 31 of the Canons of Judicial Ethics the police judge and the juvenile judge of a rural community may properly defend indigent prisoners in superior courts of general jurisdiction.**

**Defense of Indigent Prisoners—A duty resting on the bar to perform this public service when requested by the court.**

**Defense of Indigent Prisoners—No impropriety in the city attorney of a rural community defending indigent prisoners in cases other than those which it is his duty to prosecute.**

**Defense of Indigent Prisoners—A lawyer in a rural community, who is the partner of the city attorney, may properly defend indigent prisoners whom his partner (the city attorney) may properly defend.**

The bar of a certain rural community consists of seven members, one of whom is county prosecutor, one is police judge, one is judge of the juvenile court, one is city attorney, and another is the law partner of the city attorney. Of the two remaining members one is a young woman who positively declines to handle criminal cases and the other is a man who does not care for criminal practice, is not adapted to it and accepts only occasional cases.

It has been the custom of the judge of the District Court having general jurisdiction of criminal cases, to appoint various members of the bar to defend indigent defendants. A controversy has arisen between the judge and the members of the bar as to who, in view of the Committee's rulings, may properly accept such appointments.

The District Judge, who is a lawyer of high standing and judicial ability, refuses to impose all the onerous duties of defense on the single lawyer who is unquestionably eligible to defend such persons insisting that each of the other lawyers (other than the county prosecutor) take his turn in the defense of such indigents. It is stated that a refusal of the others to accept such appointments must result in the practical denial of counsel to many persons charged with crime. Defendants who can afford it may secure counsel from other communities, but such counsel must necessarily charge larger fees, so that their services are not available to poorer persons. It is further stated that this condition is even raising a presumption among the laity that all of the lawyers are in league with the prosecuting authorities so that those accused of crime do not always receive that fair and impartial consideration of their case which justice demands.

The members of this bar desire to know whether it would be proper for some of them to accept appointment to defend such indigent persons, even though it might not be proper for them to accept similar employment for compensation, or whether they should refuse such appointment and incur the disapprobation of the court. They, therefore, request the Committee's opinion:

(a) As to whether, under Canon 31 of the Canons of Judicial Ethics, the police judge and the judge of the juvenile court may properly accept employment to defend, in another court, persons accused of crime; and whether the answer would be varied by the fact that such employment was accepted, in the case of an indigent person, through appointment by the court, as a professional duty.

(b) As to whether, under the rule laid down in Opinion 34, the city attorney should decline to accept appointment to represent such indigent persons in courts other than the one in which he prosecutes offenders for violations of municipal ordinances.

(c) As to whether, under the last sentence of Opinion 33, the partner of the city attorney may properly represent those accused of crime in courts other than the one in which the city attorney prosecutes offenders for violation of municipal ordinances, and whether the answer would be varied by the fact that

such employment was accepted, in the case of an indigent person, through appointment by the court, as a professional duty.

The Committee's opinion was stated by MR. HARRIS, Messrs. Hinkley, Gallert, Strother and Carney concurring.

In answering these questions it is assumed that the laws of the state do not forbid any of the office holders involved to do the acts mentioned. Such being the case, this committee finds no impropriety in the police judge and the juvenile judge, both of whom preside over the inferior courts, defending prisoners charged with offenses before the District Court, even though they are privately retained and compensated. Such practice is permitted by Canon 31 of Canons of Judicial Ethics, subject to the limitation that the inferior judge so practicing shall scrupulously avoid conduct "whereby he utilizes or seems to utilize his judicial position to further his professional success." The question submitted raises no suggestion of this evil.

For stronger reasons this practice is not improper when rendered by appointment of the District Court, in the defense of indigent prisoners. A high responsibility rests on the bar in such cases. Constitutions quite generally guarantee to defendants in criminal cases the right to be represented in court by counsel and the statutory policy of many of our states requires the trial judge to appoint counsel for indigent prisoners, and in such instances such counsel either is paid a relatively small fee from the public treasury or is paid nothing at all. In either event he is performing a public service. The last paragraph of the Oath of Admission to the Bar recommended by the American Bar Association to the various state authorities and published at the end of the Canons of Professional Ethics, reads as follows: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." This high sentiment requires the bar to carry the burden of defending prisoners unable to employ lawyers for their defense, and obviously justice and fair dealing amongst brother members of the bar necessitate that this duty be spread on the entire membership and not cast upon a very few of them. Canon No. 4 reads as follows:

"A lawyer assigned as counsel for indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

For the foregoing reasons Opinion 34 does not apply to the defense of indigent persons. It is commendable for the city attorney to accept his share of the burden in defending indigent prisoners when requested to do so by the District Judge, but not, of course, in cases of violation of municipal ordinances or other misdemeanors which it is his duty to prosecute.

With relation to the last portion of the question the committee adheres to the views heretofore set forth in Opinions 30, 33 and 34, except that it believes that the partner of the city attorney should accept his share of the cases involving defense of indigent prisoners. However, he should not accept private retainers to defend prisoners so long as his partner is city attorney and as such charged with the duty of prosecuting offenders against the city ordinances or other misdemeanors.

#### Opinion 56

(December 14, 1931)

**Lay Intermediaries—An attorney cannot properly accept employment from a grange association to handle legal matters for its members.**

A grange association of a Western state, which has a large membership, is endeavoring to make contracts with one or more lawyers in each county of the state for the handling of all probate matters for its members in that county at certain stipulated net fees, irrespective of the amount of work required. The Board of Law Examiners asks us to express our opinion as to whether it is consistent with the Canons of Professional Ethics, and particularly with Canons 12 and 35, for a member of the bar of that state to enter into a contract of that nature with such an organization.

The Committee's opinion was stated by MR. HARRIS, Messrs. Howe, Hinkley, Gallert, Strother and Carney concurring.

In the opinion of the Committee it is improper for a lawyer to enter into a contract of the nature described. Prior to the adoption of Canon 35, we set forth our views with relation to this subject matter in Opinion 8. In Opinions 31 and 35 and, more recently in Opinion 41, with reference to similar situations, we have set forth our interpretation of Canon 35 which deals with the subject of lay intermediaries. As the grange in question is a lay intermediary, these opinions, which hold that an attorney cannot properly accept employment from a lay intermediary to do legal work for its patrons or members, are directly applicable.

Though our opinion as to the impropriety of such a contract would not be varied by the amount of the fees or the manner in which they are to be paid, we would suggest that in our disapproval of obligatory fee schedules, which we expressed in Opinion 28, we have set forth our interpretation of Canon 12.

#### Opinion 57

(March 19, 1932)

**Business Activities—Improper for a lawyer to engage in such activities when they are of such a nature or are so conducted as to be inconsistent with his duty as a member of the bar.**

**Business Activities—Improper for a lawyer to engage in any business which furnishes its patrons with service which would be professional service if rendered by a lawyer.**

**Business Activities—Improper for a lawyer to devote a portion of his time to the management of an insurance adjusters' bureau.**

Certain lawyers propose to form a so-called "Insurance Adjusters' Bureau" for the purpose of engaging in the business of investigating and adjusting claims for insurance companies and insurance lawyers.

They do not propose to have this bureau render any service other than that which may properly be rendered by any layman. They do propose, however, to have the office of this bureau in the office of one of the lawyers in question, and intend that he will divide his time between the work of the bureau, and his practice of law. It is proposed that his name shall appear on the bureau's stationery as its manager, without mention of the fact that he is an attorney, and it is intended that the bureau shall solicit business on this stationery by means of letters which shall refer to the lawyer in question as follows:

Mr. — is now associated with the Insurance Adjusters' Bureau, and will be in active charge of

the cases referred to it. Mr. — is experienced in the investigation and adjustment of claims.

A bar association asks whether these lawyers may properly engage in the proposed business. It makes a request that the Committee, in expressing its opinion, answer the following questions:

1. Is it proper for a lawyer, who is engaged in general practice, at the same time to manage an investigating and adjustment bureau, which solicits business from insurance companies?

2. Assuming that the previous question is answered in the affirmative, is it proper for the lawyer to practice law and conduct the adjustment bureau in one and the same office?

3. Is it proper for a lawyer, who is actively engaged in general practice, to allow his name to appear on the stationery of such an adjustment bureau, as its manager, with the intent that this stationery shall be used by the bureau in its solicitation of business.

The Committee's opinion was stated by Mr. HOWE, Messrs. Hinkley, Evans, Harris, Gallert and Carney concurring.

It is not necessarily improper for an attorney to engage in a business; but impropriety arises when the business is of such a nature or is conducted in such a manner as to be inconsistent with the lawyer's duties as a member of the bar. Such an inconsistency arises when the business is one that will readily lend itself as a means for procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law. To avoid such inconsistencies it is always desirable and usually necessary that the lawyer keep any business in which he is engaged entirely separate and apart from his practice of the law and he must, in any event, conduct it with due observance of the standards of conduct required of him as a lawyer.

Some businesses in which laymen engage are so closely associated with the practice of law that their solicitation of business may readily become a means of indirect solicitation of business for any lawyer that is associated with them. *Opinions 31 and 35.* The adjustment of claims, the incorporating of companies and the handling of matters before governmental commissions and boards and in government offices fall within such classifications. It is difficult to conceive how a lawyer could conduct a claim adjustment bureau, a company for the organization of corporations, or a bureau for securing income tax refunds, without practicing law. In performing the services which he would ordinarily render in connection with any of these activities, his professional skill and responsibility as a lawyer would be engaged. The fact that a layman can lawfully render certain service does not necessarily mean that it would not be professional service when rendered by a lawyer. On the contrary, lawyers are frequently called upon to render such service for the very reason that it can be better rendered by a lawyer.

The adjustment of insurance claims by a lawyer is professional employment. In performing such a service his professional skill and responsibility are engaged. He cannot properly render legal services to a lay intermediary for the benefit of its patrons.

*Opinions 8, 31, 35, 41 and 56.* Furthermore the investigation and adjustment of insurance claims must frequently lead to some litigation, so that the solicitation of business by a bureau handling them must readily lend itself as a means of procuring professional employment for any lawyer in general practice who may be interested in or connected with it.

For the reasons stated a lawyer cannot properly devote a portion of his time to managing a bureau for the adjustment of insurance claims nor permit his name to be used on its stationery. Having thus answered the first and third questions in the negative, it is unnecessary to answer the second question. Nevertheless, reference to it is desirable because it so aptly illustrates the necessity of keeping any business in which a lawyer may be engaged entirely separate and apart from his practice of law. If such a business and his law practice should be conducted from the same office, the public could not be expected to distinguish between his dual capacities and know when he is acting in the capacity of a lawyer and when in that of a layman.

#### Opinion 58

(December 14, 1931)

**Divorce—Improper for an attorney representing party seeking divorce to confer with adverse party for purpose of getting adverse party to agree to the divorce.**

**Adverse Party—Improper for an attorney to give legal advice to adverse party not represented by counsel.**

A member of the Association asks whether a lawyer who is consulted by a client who desires to procure a divorce, may properly confer with the adverse party in an attempt to get the adverse party to agree to a divorce and whether he may, at a conference with his client and the adverse party, give the adverse party legal advice in an attempt to secure the adverse party's consent to what will, in effect, be an agreed action. It is, of course, assumed that the adverse party is not at the time represented by counsel.

The Committee's opinion was stated by Mr. HINKLEY, Messrs. Howe, Harris, Gallert, Strother and Carney concurring.

It would be a violation of Canon 9 for a lawyer consulted by a client who desires to procure a divorce to confer with the adverse in an attempt to get the adverse party to agree to the divorce.

A conference of the nature indicated in the question might easily lead to the giving of advice to the adverse party. Canon 9 provides that "it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

The proper procedure for the lawyer representing the party seeking a divorce, and having occasion to communicate with the adverse party not represented by counsel, would be to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel.

But, the disapproval herein expressed should not be understood as condemning the laudable and proper efforts which an attorney may make to bring about a reconciliation between his client and an adverse spouse not represented by counsel, when such efforts involve no discussion of the facts which furnish, or might furnish, grounds for divorce.

# THE SUPREME COURT IN WASHINGTON'S TIME\*

BY HON. WILLIAM D. MITCHELL  
*Attorney General of the United States*

THE recent vacancy on the Supreme Court of the United States has directed nation-wide attention to that tribunal and aroused the keenest public interest in the manner in which the President would discharge the duty placed upon him by the Constitution to nominate a justice to the place recently vacated by Mr. Justice Holmes. Coming at this season when the nation has paused in its other activities to pay respect to the memory of Washington, this event naturally turns our thoughts to the Supreme Court of his day, and to the part which he, as President, took in its organization.

The first Congress met March 4, 1789, and its first duty was to pass the necessary laws for the organization of the Federal Government, including the judiciary. The Constitution provides that "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It does not prescribe the number of the justices, and though it defines in a general way the limits of the jurisdiction of the federal courts, the first Congress had the important task of settling the composition of the Supreme Court, of organizing inferior federal courts, of forming modes of procedure, and most important of all, of establishing the extent of the Supreme Court's appellate jurisdiction, both with reference to state and inferior federal courts. That was done by the Judiciary Act of 1789, which was approved by President Washington, September twenty-fourth of that year. That Act was probably the most important and most satisfactory ever passed by Congress, and the wisdom and forethought with which it was drawn have won the admiration of succeeding generations. It provided that the Supreme Court should consist of a Chief Justice and five associate Justices, any four of whom should be a quorum. In an act approved the previous day, the compensation of the Chief Justice was fixed at \$4,000 and that of each of the associate Justices at \$3,500, amounts not greatly disproportionate to their present compensation, having regard to the difference in purchasing power of the dollar then and now. It also provided for the organization of the lower federal courts, and defined the appellate jurisdiction of the Supreme Court. During the six months between the date the first Congress met and the passage of this Act, the nation was without a federal Supreme Court or any inferior federal courts.

Washington, in anticipation of this legislation, had been considering appointments to the Supreme Bench and on the very day on which he approved the Judiciary Act he sent to the Senate the nominations for Chief Justice and five associate Justices. He was the only President who ever had or ever will have the task of filling at one time every place on the Court. It has fallen but to three Presidents since Washington—Presidents Jackson, Lincoln,

and Taft,—to appoint even a majority of the members of the Court, and their appointments were not simultaneous.

Many Presidents have said that the appointment of members of the Supreme Court is one of the most sacred duties with which a President is charged.

Washington's conviction as to the important part which the Supreme Court was to take in the new Government, and the grave responsibilities resting upon a President in selecting its members, is disclosed by his writings. In a letter to his future Attorney General, Edmund Randolph, he said:

"Impressed with a conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system. Hence the selection of the fittest characters to expound the laws and dispense justice has been an invariable subject of an anxious concern."

In writing to his nominee for Chief Justice, he said:

"In nominating you for the important station which you now fill, I not only acted in conformity to my best judgment, but I trust I did a grateful thing to the good citizens of these United States; and I have a full confidence that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric."

To another he wrote:

"Considering the judicial system as the chief pillar upon which our National Government must rest, I have thought it my duty to nominate, for the high offices in that department, such men as I conceived would give dignity and lustre to our National character."

The six members of the new court, appointed by Washington, were in the prime of life and of national reputation, the oldest being fifty-seven and the youngest thirty-eight, and all but two had had previous judicial experience. For Chief Justice he chose John Jay of New York, then Secretary of Foreign Affairs. Associate Justices were John Rutledge, a judge of the Court of Chancery of South Carolina; William Cushing, first Chief Justice of Massachusetts; James Wilson of Pennsylvania, probably the greatest of them all; John Blair, judge of the Court of Appeals of Virginia; and later James Iredell of North Carolina. The nominations were all promptly confirmed by the Senate.

During his service as President, Washington made a number of other appointments to the Court, but two other incidents having to do with his relations with the court are of special interest. As he was our first President, so also was he the first President to suffer the defeat in the Senate of one of his nominations to the Supreme Court.

In the summer of 1795 President Washington gave John Rutledge of South Carolina a recess appointment as Chief Justice, and in December of that year, when Congress convened, sent his nomination to the Senate. Rutledge's nomination was rejected by the Senate by a vote of fourteen to ten, largely

\*Address broadcast under auspices of Minnesota State Bar Association on Feb. 22, 1932, by National Broadcasting Co.

because he had made a speech attacking the Jay treaty. But for this unfortunate speech he would undoubtedly have been confirmed. His defeat was an event of importance in American legal history as it is unlikely, if he had been confirmed, that John Marshall, the great expounder of the Constitution, would later have received the appointment. Thus upon the event of one chance speech regarding a British treaty hinged the future course of American constitutional law.

This incident discloses that in Washington's time it was considered proper to make appointments to the Supreme Court during a recess of the Senate, and for the appointee to take office with the expectation he would later be nominated, and confirmed by the Senate. In modern times no president would think of placing a man on that Court through the power of making interim appointments.

It is also interesting to note that in 1793 President Washington sought to obtain from the Chief Justice and his associates advice upon certain legal questions, and submitted to them twenty-nine interrogatories, carefully framed. To these the Justices declined to reply, asserting the principle, later well recognized, that they are not constitutionally empowered to give advisory opinions to the President, and may only deliver opinions in actual cases or controversies between litigants brought before them as a court for decision.

The first term of the first Supreme Court opened February 1, 1790, in the City of New York. That evening the judges attended a dinner given to them by President Washington, and thus originated the custom of this day for the President annually to give a state dinner in honor of the Supreme Court.

At the opening of the first term there was little or no business to transact. The lower federal courts from which appeals were mainly to be taken were just being organized and no cases were brought to the Supreme Court. Indeed, for the next three years the court had little business before it. The first cases decided on the merits was not heard until August, 1792. From its organization in 1790 to the end of Washington's second term in 1797, the entire business of the court filled only about four hundred pages of the Reports and that much space was only necessary because it was the practice then for each Justice to write an opinion in every case. There were not as many opinions rendered during that seven-year period as the court now delivers in a single term. Notwithstanding the meager extent of its activities in these early years, Washington as well as other great statesmen of his time foresaw the important place which the court was to occupy in the development and maintenance of our constitutional government.

In the Adams administration John Marshall took his place as Chief Justice, and then commenced that series of great decisions expounding the Constitution, without which it may well be doubted whether the national union could have been preserved. No institution of government can be devised which will be satisfactory at all times to all people, but it may truly be said that the court today fulfills its function in our national system better than any instrumentality which has ever been advocated as a substitute.

From its organization the court has from time

to time been subjected to attacks. A review of its history shows that from one generation to another these attacks have been gradually diminishing, until today they are as nothing, compared with those in the early periods of our history. It has steadily grown in the respect and confidence of the people. Its place as the bulwark of the constitutional liberties of the citizen is firmly established. Excepting that the number of Justices has been increased from six to nine, and some procedural changes made, the court today is just as Washington and his fellow patriots made it. Through storms of political strife which have torn the nation, in war and in peace, it has remained unshaken, calm and deliberate, maintaining unflinchingly its own place in our governmental system and fearlessly upholding the principles of the Constitution against all attempts to override them. We know that Washington spoke truly when he said "it must be considered the keystone of our political fabric."

And now with special greetings to my friends of the Minnesota State Bar Association, at whose request I have spoken, I bid you all good night.

#### French Law Students Protest against Attempt to Make Admission to Bar Easier

(From the Bar Examiner, April issue.)

TEN THOUSAND law students of the Sorbonne and fifteen French provincial universities went on strike on the 8th of March as a protest against a recent bill passed by the Chamber of Deputies making the baccalaureate degree no longer a qualification for taking the examinations for admission to the bar in France. This degree is a passport from the secondary school to the university in the French educational system and is equivalent to something more than our high school diploma. Supporters of the bill claimed that the baccalaureate degree, with its Latin, Greek and mathematics, was not necessary for a knowledge of law, but the students had different views and their spokesman stated that if future lawyers are exempted from the baccalaureate, the profession would be congested with ignoramuses who might elbow out more worthy members. The law faculties in general sympathized with the demonstration of the students.

The Council of the Order of Advocates of the Court of Appeals of Paris joined in this protest by issuing the following statement: "Taking cognizance of the bill voted by the Chamber of Deputies on the 29th of February, 1932, on the qualifications for admission to the bar of certain classes of candidates for a license to practice law, and convinced of the grave danger which any lowering of the requirements which are today imposed for a license to practice law would bring about, and of the necessity of maintaining for the professional careers their traditional prestige, the Council makes an energetic protest against the bill passed by the Chamber and expresses the hope that the Senate will refuse to adopt it."

The strike lasted but one day but is rather an impressive example of the unity of law students, teachers of law and the Bar on the question of qualifications for admission. Up to the present time the Senate has taken no action.

# LAW ENFORCEMENT AND THE JUDICIARY IN ONTARIO

Outstanding Factors of the Ontario System Which Explain Its Comparative Success  
Are the Able Direction and Thorough Discipline of Police, Concentration of Power  
and Responsibility for Administration of Law, Independence and Strength of  
the Judiciary, Summary Trial Procedure, and Expeditious Manner of Dis-  
posing of Cases in the Courts

By DAMON C. WOODS

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THE effective administration of justice in Canada, with its resultant repression of crime, has long been known and favorably commented upon in the United States. The Province of Ontario, covering 407,262 square miles, with a population (1931) of 3,426,488, or one-third that of the entire Dominion, is typical of all the Provinces in the application of the penal statutes. Although crime has increased considerably in the past ten years, this increase is accounted for in part by the growth in population and in part by the violations of statutes relating to the liquor traffic. In the widespread endeavor throughout the United States to cope with lawlessness, the methods practiced and the results obtained in Ontario may be studied with benefit.

Observation of the Ontario system of dealing with crime reveals several outstanding factors, which explain its comparative success and justify the confidence placed in it by the citizenry. These are (1) the able direction and thorough discipline of the Dominion, Provincial and municipal police forces; (2) the concentration in the office of the Attorney General of Ontario of power and responsibility for the administration of the laws throughout the Province; (3) the independence and strength of the judiciary, from supreme court judges to magistrates, due to non-elective choice, permanence of tenure and suitable compensation; (4) the summary trial procedure, which enables magistrates, without juries, to dispose of eighty per cent of the indictable offenses, and (5) the expeditious manner in which cases are disposed of in all the trial courts and on appeal.

## The Executive and Prosecuting Officers

At the head of the law enforcement agencies of the Province is the Attorney General. This individual, who is necessarily a member of the Provincial Legislative Assembly, is selected by the Premier of the Province and is a member of his cabinet. The Attorney General holds the only political office in the administration of justice. He may be displaced at any time by the Premier, but in practice he usually holds office until the cabinet is overthrown by adverse electoral or legislative action. The salary of the Attorney General is \$10,000 per year and as a member of the Assembly he receives \$2,000 per year.

The people hold the Attorney General responsible for the strict enforcement of the laws and they

have vested in his office adequate powers for discharging that responsibility. He chooses the head of the Provincial police, the crown attorneys and their assistants throughout the Province, and all the magistrates, sheriffs and justices of the peace. These officials must report to his office and be responsive to his lawful directions. For the more serious and difficult prosecutions the Attorney General may appoint experienced barristers of standing to take charge of the Crown's interests. He also names the court clerks, known as registrars.

The regular, office-holding appointees of the Attorney General are relieved of dependence upon the pleasure of succeeding attorney generals by life tenure, except for grave misconduct or neglect of duties. The crown attorneys, one for each county or district, in order to qualify for nomination, must be barristers in good standing. Following appointment, they must cease all political activities and devote themselves to the work of their offices. They may, however, except in the cities of Toronto, Hamilton, London and Windsor, engage in the practice of civil law to a degree consistent with their official duties. Salaries of the crown attorneys vary with the volume of business handled by their respective offices. The average appears to be about \$5,000, with the maximum of \$8,500 received by the Crown Attorney for York County, in which Toronto is situated.

## Peace Officers

The Dominion Government maintains in Ontario, as in other Provinces, a division of the Royal Canadian Mounted Police. This division consists of 333 officers and men. Although charged with the enforcement of all the Dominion statutes, the Ontario force gives its attention mainly to violations of the laws relating to smuggling, narcotics and internal revenue. These police are always at the call of the local authorities in preserving order and repressing crime.

Policing of the country districts, the villages and small towns of Ontario is carried on principally by the Ontario Provincial Police. This body of trained, uniformed officers and men, now numbering 400, is under the command of a commissioner named for indefinite tenure, as before stated, by the Attorney General. The present commissioner is a former major general in the Canadian Army. The distribution of the force is by units for the various districts, each unit through its commander being

available to the needs of the local executive and judicial authorities.

The incorporated cities and towns maintain their own police and detective forces, but these are not under the exclusive control of the municipal heads. The Police Commissioner at Toronto, for instance, is chosen for an indefinite term by a board consisting of the Mayor, as chairman, and two county judges, these latter being appointees for life of the Dominion Government. The police department of Toronto, a city of 627,582 inhabitants, comprises 997 officers and men. Through his power to order provincial police to duty in any city or town of the Province, the Attorney General exercises a salutary control which, although rarely exerted, has aided in bringing the municipal police forces to what is generally regarded as a high state of efficiency.

### The Judicial Organization

The judicial power in Canada is vested in the Supreme Court of the Dominion and in the superior and inferior courts of the Provinces. Through its exclusive authority of naming the judges for the Dominion Supreme Court and the provincial superior courts, and its power to impose on these courts such prerogatives and duties as it deems proper, the Dominion Government maintains the ultimate control of the judicial machinery of the country. This is the more essential in view of the fact that the courts of Canada, like those of the United States, have the power and obligation of determining the constitutionality of legislative enactments. The governments of the provinces, however, have been granted control of the constitution, organization and general procedure of the courts within their borders. They may make changes in the existing courts, abolish any of them or establish new ones. But whenever a new judge is required for a superior, district or county court, it is the Dominion Government which provides the salary and makes the appointment. The Province usually allots a small, supplementary salary and in all cases provides office quarters for the judges and travel expenses when they go on circuit.

*The Supreme Court of Canada.* The Supreme Court of Canada was created by act of the Dominion Government in 1875. It entertains appeals from courts of last resort of the provinces, in both civil and criminal cases, and it is the highest court to which any criminal appeal can be carried. (In civil cases deemed of gravity an appeal is allowable to the Judicial Committee of the Privy Council, sitting in London.) The Supreme Court of Canada is composed of a chief justice and six *puisne* justices, who act as associates. Justices of this court may be chosen from any province, with the proviso that two must come from the Province of Quebec. This requirement is to give the court adequate familiarity with French-Canadian law.

*The Courts of Ontario.* The Supreme Court of Ontario consists at present of nineteen justices, three of whom are designated as chief justices. This court is divided into trial and appellate divisions, the former being known generally as the High Court and the latter as the Court of Appeal. The chief justice of the entire court, who at present is the venerable and distinguished Sir William Mulock, is known as Chief Justice of Ontario. He

presides over the first division of the Court of Appeal and a second chief justice presides over the second division of this court. Three justices normally constitute a division but the number is often increased to five for important cases.

The trial division, or High Court, of the Supreme Court of Ontario, consists of ten justices, of whom one acts as chief justice. This court holds sessions twice yearly in each country or district of the Province. Its criminal sessions are known as assizes, being commonly alluded to as the Spring Assize and the Fall Assize. Each session, whether for civil or criminal cases, is presided over by one of the ten justices, who goes on regular circuit as scheduled by the chief justice.

Any one of the ten trial justices may be called to the appellate division by the Chief Justice of Ontario for temporary duty, but permanent assignment there must come from the Dominion Government.

Just below the trial division of the Supreme Court of Ontario, and having jurisdiction of civil and criminal cases of lesser importance, are the county courts. Each of the forty-eight counties has a county court and for each court there is at least one judge. In the more populous counties there may be additional judges, known as junior judges. In York County, which includes Toronto, there are one senior and seven junior county court judges. In other counties are found a total of nine junior judges, making sixty-four county court judges for all the province.

County judges preside at the quarter sessions for the trial of criminal cases and in the division courts for the adjudication of suits involving not over \$200.00. They try civil suits involving larger amounts at county court sessions and they also act as judges of the Surrogate courts, unless, as in Toronto, one of their number is specially designated as Surrogate judge.

Below the county courts in rank and jurisdiction, but discharging in practice a much greater volume of duties in the domain of criminal law administration, are the courts of the magistrates and the justices of the peace. There are at present about 250 magistrates and 5,000 justices of the peace in Ontario. These latter are nearly all inactive, using the title mainly to perform notarial acts, and the judicial business in this jurisdiction is performed in the main by salaried magistrates.

### Personnel of the Judiciary

*Appointment, Tenure and Compensation.* The dignity, independence and efficiency of the judiciary of Ontario, as of Canada as a whole, are due to the following factors: (1) the judges are appointed for life; (2) judicial tenure is secure against political changes and popular influence, and (3) the remuneration, honor and permanence of the judicial positions attract barristers of the highest character and of outstanding ability.

Appointments to the Supreme Court of Canada, the Supreme Court of Ontario (as well as to the superior courts in other provinces) and to the county (or district) courts are made by the Governor-General-in-Council, acting upon recommendations of the Dominion Minister of Justice. Appointments to the lesser judiciary, comprising the magistrates and justices of the peace, are made formally

by the Lieutenant-Governor (representative of the Governor-General and titular head of the Provincial government) upon nominations of the Attorney General of the Province.

Supreme Court justices are chosen from the superior courts of the Provinces or from barristers of distinction having at least ten years' standing at the bar. County court judges must be barristers of at least seven years' standing. Their appointment must be for another county than that in which they are residing. Stipendiary and police magistrates need not be lawyers and no special qualifications are imposed.

All appointments to the judiciary are for life. The Supreme Court and county court judges, appointed by the Dominion government, are subject to investigation by the Minister of Justice, if any charge of gravity be brought against them, but none of these judges can be removed except by action of the Governor-General, following an address from the Dominion Senate and House of Commons, after full consideration of the facts of the case. Magistrates and justices of the peace may be removed for incompetence, corruption in office or gross neglect of duty by the Attorney-General of Province, following investigation by his office.

The justices of the Supreme Court of Canada receive salaries of \$12,000 per year, with \$15,000 for the chief justice. Salaries paid by the Dominion to the justices of the Supreme Court of Ontario are \$9,000 per year; the chief justices receive \$10,000. In addition, each member of the court is paid \$1,000 per annum from the Provincial treasury. County court judges receive \$5,000 per annum from the Dominion and \$1,000 from the Province, the latter amount being in compensation for services as Surrogate judge. The county court judges at Toronto receive supplementary revenue, bringing their total compensation to \$7,000 per year.

The pay of magistrates and justices of the peace in Ontario was derived exclusively, in former years, from fees collected by the offices. The evils of the fee system, which inspired excessive zeal in enforcing some laws, the frequent violations of which produced easy revenue, and indifference toward other laws less remunerative in their infractions or more difficult of enforcement, resulted in a movement to place magistrates upon adequate, fixed salaries and thereby relieve them from dependence upon fees. This movement applied also to prosecuting attorneys, clerks and sheriffs. The Attorney General was empowered to make the necessary changes through orders-in-council and so thoroughly has the reform been carried out that three-fourths of the magistrates are now on a salary basis, and it is expected that the reform will be complete within another two years.

With the elimination from active duty of the justices of the peace, still dependent upon fees, and their replacement by a unified, trained and capable body of magistrates, devoting all or the major part of their time to criminal matters within their jurisdiction, some of them holding court at several places, a great improvement has resulted in the enforcement of the laws relating to minor offenses and in the despatch of felony cases under the Summary Convictions Act. In 1930 the magistrates of Ontario disposed of 134,000 violations of the law, as compared to 3,000 by the courts of record. The

importance of having an honest and intelligent administration in the magistrates' courts is evident from this volume of criminal business.

*Retirement.* Justices of the Supreme Court of Canada and of Ontario may retire on full pay, at their option, upon reaching the age of seventy-five years. County court judges must retire, at full pay, on the attainment of that age. There is no provision for the retirement of magistrates and justices of the peace. In practice, many retain office after becoming superannuated, but it is usual in such cases to effect a divisional compensation arrangement with a substitute who carries on the work of the office.

#### Officers of the Court

Aside from the crown attorneys, already discussed, the principal court officers in Ontario are the registrars and sheriffs. The former correspond to clerks of courts in the United States but the latter do not correspond precisely to our sheriffs. Sheriffs in Ontario are not peace officers in the sense of investigating law violations and making arrests. This work is left entirely to the police. The sheriffs have charge of the jails, receive prisoners from arresting officers, produce them in court and effect transfers after arrest and conviction.

All appointments to the offices of registrar and sheriff in Ontario are made on recommendation of the Attorney General. As in other cases, he seeks the advice of members of the Provincial Assembly from the county or district wherein the place is to be filled. Appointees hold office for life, subject to resignation or removal for grave cause. These are honorable and responsible positions, suitably compensated and secure of tenure.

#### Inspection of Legal Offices

A branch of the Attorney General's department at Toronto, capital of Ontario, is in charge of an official known as the Inspector of Legal Offices. This officer makes an annual inspection of and requires reports from all the courts below the Supreme Court. The examination and reports cover accounts of all officers handling public funds, and they extend also to methods of conducting legal proceedings and the despatch of business, particularly in the offices of magistrates and justices of the peace. Report is made of delinquencies in the transmission of funds collected and in the performance of official duties, with recommendations to the Attorney General as to the remedial action deemed necessary.

The Legal Inspector, among other activities, endeavors to promote uniformity in the treatment of offenders by magistrates, particularly in the more common classes of petty offenses and infractions of the code. He may not direct or even recommend the imposition of higher or lower penalties, but by collecting statistics and disseminating them to all the magistrates he keeps them informed of the punishments inflicted by others, and he may call the attention of a magistrate to the fact that his sentences are sharply above or below the average. Thus recently it was ascertained that a magistrate in one county never assessed more than the minimum penalty of seven days' imprisonment for driving a motor vehicle while intoxicated, whereas just over the line in another county the magistrate al-

ways pronounced a sentence of thirty days. Attention was called to this variance, and to the average of all the magistrates, in letters to the two magistrates concerned.

### Criminal Law Administration

No distinction is made in Canada between offenses on the ground of their being felonies or misdemeanors. Section 28 of the Dominion Code divides violations of the law into "indictable offenses" and "offenses." The former are subdivided into those triable summarily and those which must be tried by courts having superior criminal jurisdiction. The summary trial of indictable offenses, which will be dealt with later, is a trial conducted by any judge designated as a magistrate, with the consent of the accused and without indictment or jury. Indictable offenses not subject to the summary procedure include treason, piracy, mutiny, murder, manslaughter, rape, defamatory libel, corruption in public office and certain other crimes against the safety or service of the State. Minor violations of the law, known simply as "offenses," are triable by county judges, magistrates or justices of the peace, as provided for, with or without consent of the accused.

Preliminary examination and grand jury procedure is similar to that in the United States, although the work of the grand juries has been reduced by the disposal of the great majority of indictable cases through the summary procedure before magistrates. There is occasional discussion of the advisability of suppressing the grand jury as unnecessary in the present administration of Canadian justice. It was suppressed for British Columbia at the last session of the Dominion Parliament.

Criminal trial procedure is derived from the same sources and is similar in practice to that obtaining in the United States district courts. It is customary in the Assize Courts of Ontario, presided over by Supreme Court justices, for only one attorney to conduct the examination of witnesses and the delivery of arguments for either side. If the defendant submits evidence, his counsel has the opening argument, being followed by the attorney for the Crown. There is no rejoinder.

The most important address to the jury is that of the judge. In reviewing the evidence and applying the law, the judge is allowed considerable latitude and his instructions have much to do with the character of verdict returned. In no instance does the judge have to deliver a copy of his charge to the lawyers before delivering it. In fact, the charge is usually spoken from notes made by the judge during the trial and taken down by the court reporter, who makes it a part of the transcript for purposes of appeal. Lawyers may not interrupt the judge during delivery of the charge, or "summnig up," as it is called in Canada, but at its conclusion they may request corrections, modifications or additions.

Unanimous agreement of the jury is required for a verdict of guilty. The verdict is delivered orally in open court by the foreman, in response to interrogations by the judge. The jury has no concern with the fixation of the penalty, but it may recommend mercy, which the judge is at liberty to consider or disregard. In general, the recommenda-

tion is followed, but it is the judge who is charged with exclusive power and responsibility in determining the sentence.

**Appeals.** Appeals in Ontario may be taken from convictions in the justice or magistrate courts to the General Sessions of the Peace, presided over by a county judge, where a new trial is provided. From judgments of the county and Supreme courts appeals may be taken to the Appellate Division of the Supreme Court of the Province and, in case of dissent among the justices of that court, a further appeal may be carried to the Supreme Court of the Dominion, at Ottawa.

The Revised Statutes of Canada contain certain provisions directing the appellate courts to disregard technical pleas. It is deemed of interest to quote the language of the following:

"1011. No omission to observe the directions contained in any Act as respects the qualifications, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selection of jurors' lists, the drafting of panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case."

"1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial; Provided, that if the court of appeal is of opinion that any challenge for the defense was improperly disallowed, a new trial shall be granted."

Upon the hearing of the case on appeal, the court may affirm the judgment below, increase, diminish or otherwise modify the sentence imposed, within legal limits, reverse the judgment or make such other order as justice requires. The appellate courts are enjoined by statute and by administrative practice to give expeditious treatment to appeals in criminal cases. Notice of appeal must be given and the record sent to the appellate division within thirty days of the date of sentence. If the appeal remains on file more than twenty-one days without being placed on the docket, the registrar must draw the fact to the attention of the chief justice, who must then set it down for early hearing. This hearing consists ordinarily of oral pleadings by the defendant's attorney and the counsel for the Crown. It is unusual for a printed brief to be filed by either side.

While the Crown may not appeal from an acquittal, following trial on a valid indictment in a court of competent jurisdiction, it may appeal from a sentence deemed improper or inadequate. As an example, in a case several years ago involving an assault at night by a band of hooded men, the leader, a physician at Hamilton, was fined \$50 by a local magistrate. Instead of paying the fine, the defendant appealed. Thereupon, the Attorney General filed a cross appeal on the ground that the penalty was grossly insufficient. The Court of Appeal of Ontario agreed with this view and added a sentence of three months in jail.

Decisions on appeal are usually rendered within a week or two after submission of the case. It is rare for a decision to be delayed over three months from the date of sentence in the trial court. As a result, individuals charged with the most serious crimes in Ontario are certain to have their cases finally disposed of within six or eight months of

the date of arrest. The business-like despatch of cases, together with the liberal discretion given trial judges in applying procedural law, have been effective in reducing the number of appeals. Out of approximately 3,000 criminal cases tried per year by the courts of record in Ontario, appeals are taken in less than one hundred. In 1930, such appeals numbered 78. The judgment below was affirmed in 31 cases, modified in 13 and reversed in twenty-two. Eleven of the appeals were abandoned and one case was taken to the Supreme Court of Canada, which dismissed the appeal.

#### Summary Trial of Indictable Offenses

In view of the interest in police and prosecuting circles in the United States in the possibility of establishing a procedure to allow trials, without indictment, of persons accused of felonies who would accept such procedure, the experience of Canada is of value. The Act relative to the summary trial of indictable offenses in the Dominion was enacted by the Parliament in 1897. It was designed to secure, with the defendant's consent, a speedier trial of all indictable offenses except those punishable capitally and a few others specially named. Under this Act, in the Province of Ontario any recorder, judge of a county court if empowered as a justice of the peace, commissioner of police or police magistrate may try summarily, with his consent, any person who may be charged with an offense triable by any court of general or quarter sessions of the peace. If found guilty the accused is liable to the same punishment as he would have been subject to if tried after indictment before a jury in the competent tribunal.

The procedure for summary trials is very simple. The magistrate reduces the charge to writing and reads it to the accused. If the latter confesses the charge the magistrate hears what evidence he thinks useful and passes sentence. If the accused pleads not guilty the magistrate examines the witnesses for the prosecution and hears the evidence offered by the defendant. The latter has the right to be represented by counsel and to have all witnesses examined or cross-examined. Following completion of the testimony and arguments the magistrate renders his judgment.

The magistrate is not required in all cases under the Summary Convictions Act to accept jurisdiction if the defendant consents. He may decide that, owing to a previous conviction or to any other circumstance, the case should follow the indictment route. He then acts merely as an examining magistrate, reducing the evidence to writing and remanding the defendant to the next grand jury. The fact of a previous conviction, however, does not of itself deprive the magistrate of summary jurisdiction.

As an instance of the celerity of summary trial procedure, and of Ontario justice, the recent case of Jack Allen, 21, and Andrew Waghorne, 24, may be cited. These two young men decided six weeks ago to make their living by robbery. After a series of automobile thefts and armed hold-ups, they were arrested by detectives at Toronto. Both confessed and accepted trial before Magistrate R. J. Browne,

who heard the facts and promptly sentenced each to twelve years in the Kingston penitentiary and to twenty strokes of the strap. By Article 1060 of the Canadian Code the second part of the punishment assessed will not be inflicted until ten days from the expiration of the prison term. The *Toronto Globe*, in editorial approval of these sentences remarks:

"Of late there has been abundant evidence that the law cannot be flouted with impunity by such thugs. Punishment has been swift and certain. The men sentenced were arrested only last week-end, and yesterday saw their criminal career cut short by a term of imprisonment that will give them time to meditate over the folly of trying to live by the gun. . . . Clever and prompt work by the police, coupled with these salutary sentences, should lessen the number of young thugs embarking on a career of crime. They may be assured that in the end the law will win."

Perhaps the reason that crime lacks organization in Toronto is that Canadian justice does not give it time to get organized.

In Ontario over 80 per cent of the indictable cases are disposed of by magistrates under the Summary Convictions Act. When it is considered that about 15,000 persons per year are now being committed for indictable offenses in the Province to penal institutions, the saving in expense of jail confinement while awaiting trial, the saving in cost of witness attendance upon grand juries and at superior court trials, and the saving in outlay for juries additional court officers, together with the immense economy in time for the defendant and all others concerned, make it apparent that the summary procedure is a great improvement over the regular costly and time-consuming procedure which it displaces with the defendant's consent, even though in Canada the regular procedure works with a maximum of speed and thoroughness.

#### Comments on the Regular Procedure

The visitor to an Ontario court, during the trial of a contested criminal case, is impressed by the fact that the presiding judge exercises, without hesitation, a wide discretion in determining all questions relating to procedure and evidence. In directing the trial he has the active and always respectful co-operation of the lawyers engaged.

The essentials of an indictment in Canada are that it recite the commission by the accused of an indictable offense. Amendments may be made at any stage of the trial, if without real prejudice to the accused, so that non-conformity of averment to fact proved can be corrected when made apparent without necessitating another indictment and trial.

The selection of a jury in Ontario is quickly accomplished. Even in murder cases, where either side is allowed twenty peremptory challenges, a jury is usually completed within half an hour. A justice of the Supreme Court who for the past eight years has been holding Assize courts in Ontario stated to the writer that he had never had a case before him in which the selection of a jury consumed more than forty-five minutes. He said that while at Windsor during an Assize term he tried seven contested criminal cases while a jury was being selected in a murder case just across the border. Yet in all their essentials the system of jury

selection is the same in Michigan as in Ontario, both being derived from the English common law.

Unanimous agreement of the twelve jurors is required in criminal cases in Canada, but so clear and thorough is the presentation of the case by the judge in his final summing-up that disagreements among juries are rare. When they do occur, the case is prepared immediately for re-trial, either at the same or the next term. As the most important criminal cases are ordinarily concluded within two or three days, cases can be handled much more expeditiously than if they consumed two or three weeks.

The trial of several offenders together presents no serious difficulty to Ontario courts and the judge has full discretion in granting or refusing a severance. In November, 1931, nine officers and members of the Communist Party of Canada were tried in the Fall Assizes at Toronto on an indictment charging them with conspiracy and participation in an unlawful association designed to overthrow the government of the Dominion. A panel of 140 talesman was used to supply the jury; although the case had been widely written up in the press, the jury was soon completed. After eight days the trial resulted in the conviction of eight defendants and dismissal as to the ninth. Sentences of five years' imprisonment for seven and two years for the eighth were pronounced by the judge. The judgment on February 19, 1932, was unanimously affirmed by the Court of Appeal of Ontario and, no further appeal being possible, the convicted defendants were taken to the penitentiary.

#### Conclusion

The foregoing description and discussion have been limited, in the main, to Ontario, but it is believed that, with minor variations, they apply to conditions in all the Provinces of Canada. The effective administration of the penal laws is unquestionably due (1) to the permanent, non-political personnel in police and judicial offices and (2) to the simplified, non-technical procedure applied in a direct and business-like manner by judges clothed with adequate authority.

It may be added that the strengthening of the Canadian system of criminal justice did not await the massed attacks of organized criminality to demonstrate inherent faults or archaic frailties, but it was brought about in due time, so that the constituted authorities are quite capable, without the aid of crime commissions, press campaigns or an aroused public conscience, to meet and despatch all violators, professional or amateur, of the Canadian laws.

It may be interesting to note, as a final comment, that while the homicide rate of the United States in 1931 was 10.8 per 100,000 of the population, that for Canada was only 1.6 per 100,000. Statistics from forty representative United States cities for the year showed an average rate of 25.4 per 100,000. Among these were Memphis with 58.8, Cleveland with 17, Chicago with 14.4, Detroit with 13.3 and New York City with 7.1. The rate for Toronto, Ontario, was 0.9, there being only 6 homicides for its 627,582 inhabitants.

## Massachusetts Judicial Council Makes Seventh Annual Report

THE Seventh Annual Report of the Massachusetts Judicial Council was filed with the Governor on Dec. 15. It states that much of the time of the Council during the early part of the year was devoted to the study of the proposed new rules of the Superior Court which were submitted to it by the Court's Committee on Rules with a request for recommendations, which were subsequently made to that court. The matter of admission to the bar, which was discussed at length in the last report, is the subject of the single recommendation in the present one viz: that more adequate funds be appropriated by the legislature to enable the Bar Examiners to do their work more effectively.

In regard to the matter of professional discipline, the Council recommends that this should be dealt with by the courts and the bar without additional legislation. In Suffolk County a Grievance Committee of the Boston Bar Association does effective work with the assistance of a paid permanent secretary, but in other parts of the State the grievance work has been less effective, partly from lack of funds and partly from the difficulty of organizing grievance committees for a disagreeable task in the smaller communities. The Council recommends that the Chief Justice of the Supreme Judicial Court designate committees of members of the bar in various districts of the State in which better grievance work is needed, and that these committees serve in their various districts to assist the court as the Boston Committee does in Suffolk County. The Council also recommends that the Chief Justices of the Supreme Judicial and Superior Courts designate members of their respective courts to hear such cases as may be brought before the court, to the end that there may be a more uniform practice in dealing with such cases.

The Council renews its recommendation of former years of a reasonable entry fee for civil actions in the Superior Court and points out the great and growing cost to the public of this court in which jury trials take place. The present entry fee of three dollars was fixed in 1888 and has remained at that figure ever since, although the cost of everything else has gone up. The Council states that while the courts should be open to all without unreasonable cost, it seems a fair principle, when the public provides two tribunals, one the District Courts in which the cost to the public is relatively small, and the other the Superior Court in which the cost to the public is very large, that the person who wishes his case tried in the more expensive court should pay more than three dollars towards the public cost of maintaining the latter. In support of this recommendation it is pointed out that the cost to the public of a jury trial, for judge, jurors, court attendants and overhead in the Superior Court is estimated at between \$400 and \$500 a day, and that if a case is tried in that court before juries, the figures show that in about half of them the plaintiff recovers nothing and in the other half the verdicts recovered by the plaintiff are mostly small verdicts—less than \$1000, and a large part of these less than

\$500; so that in many cases the cost to the public of the trial equals or exceeds the amount recovered by the plaintiff.

The Council also points out that a plaintiff in the United States Courts is required to make a deposit of \$15 and recommends that the entry fee in the Superior Court be raised from \$3 to \$10. The total net annual cost to the public several years ago of the judicial system was somewhat over \$6,000,000, and if jails, prisons, etc., were included, it was about \$10,500,000. That cost has been increasing ever since. The Council states its opinion that this problem must be faced continually by the legislature in the public interest until it has been put upon a more reasonable basis. Tables are given in the report showing the increasing cost of juries and their incidental expenses for the various counties.

As to the administration of the criminal law, the Council recommends the continuation for the present of the act allowing District Court Judges to sit with juries in the Superior Court for the trial of misdemeanor cases. It also recommends the experiment in the Municipal Court of the City of Boston of an appellate body of Judges for a summary review of sentences imposed in that court, instead of the present system of appeals to the Superior Court on the whole case, which results in double trials on the facts in two courts. The plan would provide that there should be one trial on the facts only, and that if the defendant wished that trial to take place in the Superior Court before a jury, the case should be sent up at once without trial below. If the defendant does not ask for such removal, the case should be tried in the Municipal Court without appeal except on questions of law, which would go to the present appellate division of that court. There would also be, as already stated, an opportunity to appeal from the sentence, not to the Superior Court but to the appellate tribunal in the Municipal Court itself. The Council believes that this experiment would result in greater promptness and more effective administration of the criminal law. The Council states, "We do not believe the Commonwealth can afford not to try this plan when the public are clamoring for some constructive work to meet the problem of crime."

The report contains an extended discussion of a passage in the recent report of the Budget Commissioner for the city of Boston which suggests an extension of financial control to various positions, including those of court officials whose salaries are not now within the County Control Act of 1930, on the ground that the county pays the bills under our existing arrangements and should therefore be "supreme." The Council points out that the administration of justice under the Constitution is primarily the responsibility of the Commonwealth as a whole, as represented by the Legislature, and that the Commonwealth ought to retain the control in order to meet its responsibilities, and should not further abdicate its functions by transferring the responsibility to the counties. All the courts of the Commonwealth, including the District Courts, are courts not of the counties but of the Commonwealth. The judges of all the courts are appointed by the Governor and a vital part in setting up a court consists in giving it the means to live and function as an independent tribunal of justice, which it is the constitutional duty of the Legislature to provide. Accordingly, the assistants to the judiciary are rep-

resentatives of the Commonwealth and should be kept as such even though their salaries are paid by the counties.

The Council recommends that no more court officials or employees be brought within county control and in connection with this recommendation says: "We trust that it is not necessary for us to explain that we are speaking of measures and not of men; that we are considering the tendencies of such measures on the administration of justice during generations, regardless of any temporary political organization of the various local county governments. To the Massachusetts traditions of avoidance of reciprocal political relations between the local courts and local politics has been due, in no small measure, our escape from some of the consequences of a closer relation which have vexed communities in other states and discredited some courts in public opinion. But the momentum of the practice of such avoidance cannot last indefinitely unless it is protected in statutory arrangements which reflect the constitutional policy of Massachusetts, stated and explained in the 29th article of the Bill of Rights, of a judiciary 'as free, impartial and independent as the lot of humanity will admit.' The history of local politics in the various American states and its relation to the courts in some of them, illustrates, sufficiently, that the considerations, which we have stated, are not merely theoretical, but are practical illustrations of the meaning of the sentences in the 29th article of the Bill of Rights. That article sets and explains the standard of American justice and has furnished a recognized background for the constructive thinking of the country in regard to its judicial arrangements.

"We make no criticism of the county control plan of St. 1930 Chapter 400 so far as the purely internal affairs of the counties are concerned. But when it reaches into the state judicial system, and when it is proposed that it should be further extended into that system, a competing element enters the picture—the independence and integrity of the courts which, at all costs, should be kept free not only from the reach, but, so far as is possible, from the suspicion of political influence. Massachusetts cannot afford to allow the officials and employees of the courts of the state (and all the courts are courts of the state) to be regarded and treated merely as county servants. . . .

"We also suggest that it is worth consideration whether the whole chance of the danger which we have described might not be more effectively and permanently eradicated by making the entire judicial cost state-borne, with a reassessment of a just part upon the several counties."

A recommendation is made to authorize an employer to pay wages not in excess of \$200 to the relatives of a deceased employee who dies intestate, without requiring the family of the employee to go to the inconvenience and expense of taking out administration.

The Council has under consideration the revision of the forms of writs, used in actions at law in order to make them more intelligible to the persons upon whom such writs are served. The Council expects to submit recommendations on this subject to the various courts. It has recommended that private conversations between husband and wife be made admissible in evidence in all domestic relations

cases. Such conversations are now admissible only in non-support cases. The recommendation is made that, in order to avoid unnecessary duplication and sometimes triplication of work and expense to the public, the holding of inquests be made discretionary with the District Courts, unless there is a written request of the Attorney General or the District Attorney.

The legislature at its last session requested the Council to report on a number of bills pending before it. These bills are taken up separately and discussed and suggestions are made in regard to them.

Most of them deal with matters of court procedure. As to one of these relating to the method of reporting evidence on appeals to the Supreme Judicial Court, the report refers to the expense and delay of reducing the evidence to "narrative form" and states that the Council expects to make suggestions later in regard to the matter. The latter part of the report is taken up with an account of the work accomplished by the various courts during the year. Statistical tables are given showing the growth of the business in the different courts of the Commonwealth.

## SOLICITOR GENERAL'S BANKRUPTCY REPORT

(Continued from page 297)

perform the duty otherwise imposed upon the trustee. If the duty of examining into the merits of the bankrupt's application and opposing it if proper, is placed by law upon the trustee or upon the United States District Attorney or one of his assistants, it seems probable that this duty would be as fully and as efficiently performed as it would be by an "examiner" should Congress in its wisdom see fit to create this office.

It is true as stated by the Solicitor General that the present restrictions upon the bankrupt's discharge are practically inoperative as the creditors do not avail themselves of the grounds of objection now open to them. It would appear to be the wisest course to devise means to make the existing restrictions upon the bankrupt's discharge effective before undertaking to add further restrictions. The Solicitor General does not propose to add any new grounds for the *denial* of the bankrupt's discharge but he does propose to add to our law certain provisions under which the bankrupt's application for discharge may at the discretion of the court be *suspended* "for a period not exceeding two years from the date of the order." Unquestionably, some of the grounds of "suspension" suggested have theoretical merit but as a practical matter it is believed they would have little, if any, influence in increasing the assets of bankrupt estates, repressing wrongful acts, or improving the moral standards of business. As the possible *denial* of the bankrupt's discharge has only a slightly repressive effect in the present domain of the law, the possible *suspension* of the discharge for two years in the proposed new domain could hardly be expected to prove very effective.<sup>13</sup>

13. The denial or suspension of the bankrupt's discharge under the English bankruptcy law entails far more serious consequences to the bankrupt than would a similar denial or suspension under the Solicitor General's proposed legislation. Under the stringent provisions of the English law the title to all property of the bankrupt vests in his trustee until he is granted a discharge. Under our law the trustee gets title to only such property as the bankrupt owned at the time of the filing of the petition. Under the Solicitor General's plan of "suspending the discharge" the same principle is to apply and the right of the Court, in case the discharge is "suspended," to order the bankrupt to turn over to his trustee after acquired property is to be hedged about with so many restrictions as to be of very slight value. Furthermore, the English law contains provisions which render it almost impossible for the "undischarged bankrupt" to engage in mercantile pursuits and he is disqualified from holding many important public offices of honor and profit. It may be truthfully said that in England an undischarged bankrupt is a commercial and political outcast. Those who praise the English bankruptcy system generally concede that its administration is expensive and slow and they find its great merit in the fact that it tends to repress dishonest trading. The Solicitor General concludes, we think properly, that it will be impracticable to engraft upon our statute the stringent restrictions and penalties of the English system. It is unfortunate that he should seek to apply here only those features of the English system which render it "expensive and slow."

### X.

Our present bankruptcy law has been in operation for more than thirty-three years. The law has been strengthened and improved by incorporating amendments from time to time to remedy defects disclosed in its practical application. Nearly all the important provisions of the law have been judicially construed so that their scope and meaning are authoritatively established. There are unquestionably some features of the law which can be improved by further amendments and these should be made, but made with caution and without sacrificing those sound provisions of the act which have been proven good under the test of time and experience. The Solicitor General seeks to rewrite our law, and to introduce many features, new to us, but old in application somewhere, which experience teaches us would not work well in our country. Taken as a whole it is believed that the Solicitor General's plan of reform if adopted would do more harm than good. As a general proposition, insolvency, failure, bankruptcy, brings trouble and disappointment to everybody concerned. Everyone is dissatisfied with the outcome. The creditor classes listen eagerly to the reformer who offers a "remedy" for present ills. But it is certain that there is no legal magic which can make failure look like success. It will be wiser to "bear those ills we have than fly to others" which are almost certain to be worse.

### Cleveland Bar Association Committee Wins Important Case

THE Committee on Supreme Court Rule No. 28 of The Cleveland Bar Association won an important case on March 23rd, according to the Daily News and Legal Recorder of April 2, when Common Pleas Judge Irving Carpenter of Norwalk, Ohio, handed down a decision which enjoined a certain law firm from acting as regional counsel for the Legal Aid Bureau of the Brotherhood of Railroad Trainmen and from accepting lawsuits of members of the legal aid bureau that are referred by the bureau. The request of the committee that the firm be enjoined from further handling cases referred by the bureau and already filed, was denied.

# Roll of Honor

## MEMBERSHIP CAMPAIGN

### 1 9 3 2

[This list includes all members who have secured new applications for membership from March 14th to April 13th, inclusive.]

#### Arizona

Walton, Matt S., Phoenix.  
Woods, Charles R., Bisbee.

#### Arkansas

Cockrill, Ashley, Jr., Little Rock.  
Wooldridge, Harry T., Pine Bluff.

#### California

Baillie, Norman A., Los Angeles.  
Bartlett, Alfred L., Los Angeles.  
Bishop, Edward T., Los Angeles.  
Carroll, William J., Los Angeles.  
Crump, Guy Richards, Los Angeles.  
Finney, A. C., El Centro.  
Fox, Walter C., Jr., San Francisco.  
Fryer, Charles M., San Francisco.  
Harper, J. C., Los Angeles.  
Higgins, John C., Jr., Los Angeles.  
Hurt, Arthur C., Los Angeles.  
Knight, F. A., Long Beach.  
Knight, Samuel, San Francisco.  
Kranz, Leslie H., Los Angeles.  
Levering, Martin M., Los Angeles.  
Levinson, Aaron, Los Angeles.  
Louttit, Thomas S., Stockton.  
Luce, Edgar A., San Diego.  
McGovern, Walter, San Francisco.  
Mackay, A. Calder, Los Angeles.  
Metteer, C. F., Sacramento.  
Newlin, Gurney E., Los Angeles.  
Patterson, Earl S., Los Angeles.  
Pillsbury, H. D., San Francisco.  
Shattuck, Edward S., Los Angeles.  
Shinn, Clement L., Los Angeles.  
Shoup, Guy V., San Francisco.  
Thaxton, Robert C., San Diego.  
Torregano, Ernest J., San Francisco.  
Treadwell, Edward F., San Francisco.  
Truesdell, John F., Los Angeles.  
Veit, Henry C., Los Angeles.  
Webster, George B., Los Angeles.  
Woolley, J. E., San Francisco.  
Works, Lewis R., Los Angeles.  
Wright, L. A., San Diego.

#### Colorado

Burke, James T., Denver.  
Offutt, Armand, Denver.  
Shafroth, Will, Denver.  
Strickler, David P., Colorado Springs.  
Toomey, Richard A., Denver.

#### Connecticut

Coulter, Thomas D., Essex.  
Elliott, John, New Haven.  
Saltman, B. P., Bridgeport.  
Wheeler, George W., Bridgeport.

#### Delaware

Davis, George N., Wilmington.  
Evans, Charles B., Wilmington.  
Satterthwaite, Reuben, Jr., Wilmington.

#### District of Columbia

Barry, Robert E., Washington.  
Brantley, W. G., Sr., Washington.

Clark, Henry C., Washington.  
Flehart, Ralph B., Washington.  
Garrity, Raymond F., Washington.  
Hamel, Charles B., Washington.  
Hynson, N. Thornton, Washington.  
Ivins, James S. Y., Washington.  
Jackson, George R., Washington.  
Laws, Bolitha J., Washington.  
Lisenby, Albert S., Washington.  
McReynolds, F. W., Washington.  
Maurer, Robert A., Washington.  
Miller, Robert N., Washington.  
Noel, F. Regis, Washington.  
Nyce, Peter Q., Washington.  
Sandusky, Bernard M., Washington.  
Saunders, Benjamin H., Washington.  
Sinsel, Rupert A., Washington.  
Smith, John Lewis, Washington.  
Smith, William Wolff, Washington.  
Ward, William S., Washington.  
Williams, George F., Washington.  
Youngquist, G. A., Washington.

#### Florida

Akerman, Alexander, Tampa.  
Bell, John, Tampa.  
Boggs, Lucien H., Jacksonville.  
Fleming, F. P., Jacksonville.  
Knight, Raymond D., Jacksonville.  
Rose, A. J., Miami.  
Tippetts, William B., St. Petersburg.

#### Georgia

Gambrell, E. Smyth, Atlanta.  
Jones, Malcolm D., Macon.  
Pottle, J. R., Albany.  
Rosser, L. Z., Atlanta.

#### Illinois

Burroughs, George D., Edwardsville.  
Edwards, W. O., Pinckneyville.  
Fiske, Thomas E., Chicago.  
Knapp, Kemper K., Chicago.  
Lautmann, Herbert M., Chicago.  
Layman, Nelson B., DuQuoin.  
Lucey, P. J., Chicago.  
McKibbin, George B., Chicago.  
Miller, Amos C., Chicago.  
Moloney, George B., Chicago.  
Morse, Edward P., Chicago.  
Muskat, Harry, Chicago.  
Pile, Holland C., Oak Park.  
Ross, Henry G., Chicago.  
Sexton, William H., Chicago.  
Spengler, Robert O., Chicago.  
Vaught, L. O., Jacksonville.  
Whitmore, W. W., Bloomington.  
Wikoff, Howard H., Chicago.  
Wolfe, Arthur R., Chicago.

#### Indiana

Bachelder, H. K., Indianapolis.  
Conder, Earl R., Indianapolis.  
Crain, Edmond L., Evansville.  
Evans, Alfred, Bloomington.  
Hanford, Erve, Indianapolis.  
Hastings, Milton S., Washington.  
Lossieff, Zachary E., Gary.  
Powell, Lewis L., Hammond.

Richman, Frank N., Columbus.  
Rocap, James E., Indianapolis.  
Williams, Walter C., Michigan City.

#### Iowa

Bordwell, Percy, Iowa City.  
Elliott, Gordon L., Des Moines.  
Forrest, L. S., Des Moines.  
Fountain, Ray C., Des Moines.  
Guthrie, Thomas J., Des Moines.

#### Kansas

Norton, James G., Wichita.  
Whitcomb, George H., Topeka.

#### Kentucky

Smith, Herschel T., Fulton.  
Thompson, Grover C., Lexington.

#### Louisiana

Booth, Andrew B., Jr., New Orleans.  
Butler, Robert B., Houma.  
de la Houssaye, Arthur A., New Orleans.  
Grace, Matthew A., New Orleans.  
Hopkins, J. W., New Orleans.  
Hudson, F. G., Jr., Monroe.  
Marcus, Arthur A., New Orleans.  
Marks, Sumter D., Jr., New Orleans.  
Milling, Thomas M., New Orleans.  
Toler, John L., New Orleans.

#### Maryland

Barton, Randolph, Jr., Baltimore.  
Carey, Francis J., Baltimore.  
Doub, Albert A., Cumberland.  
Doub, George Cochran, Baltimore.  
Mason, E. Paul, Baltimore.  
Wailes, F. Leonard, Salisbury.

#### Massachusetts

Barnes, Charles B., Jr., Boston.  
Bartlett, Joseph W., Boston.  
Bassett, J. Colby, Boston.  
Benton, Jay R., Boston.  
Buzzell, Philip B., Boston.  
Canavan, John A., Boston.  
Chapin, E. Barton, Boston.  
Dangel, Edward M., Boston.  
Dike, George P., Boston.  
Dodge, Robert G., Boston.  
Dooley, Dennis A., Boston.  
Holmes, Robert J., Boston.  
Howard, Albert S., Lowell.  
Kenney, James H., Roxbury.  
McCormick, Richard J., Haverhill.  
Peters, Andrew J., Boston.  
Raymond, John M., Boston.  
Stone, Charles F., Waltham.

#### Michigan

Carey, Frederick A., Detroit.  
Colby, Howard H., Detroit.  
Huggett, Kenneth W., Hillsdale.  
Kelley, Dean W., Lansing.

#### Minnesota

Clarfield, A. B., Duluth.  
Cook, Theodore H., Minneapolis.

DeGroat, Frances H., Duluth.  
Faricy, Roland J., St. Paul.  
Henderson, William B., Minneapolis.  
Kueffner, William R., St. Paul.  
Running, Albert, St. James.

#### Mississippi

Garnett, Charles L., Columbus.  
Roberson, J. L., Clarksdale.  
Stovall, A. T., Okolona.

#### Missouri

Dolan, Charles J., St. Louis.  
Dunbar, James V., St. Louis.  
Hill, David W., Excelsior Springs.  
James, Grover C., Joplin.  
Kem, James P., Kansas City.  
Langworthy, H. M., Kansas City.  
Matz, Carl D., Kansas City.  
McCune, Joseph M., Kansas City.  
Parks, J. L., Columbia.  
Stone, Kimbrough, Kansas City.  
Thompson, Guy A., St. Louis.  
Weede, Orlin A., Kansas City.

#### Nebraska

Hastings, W. C., Omaha.  
Johnsen, Harvey M., Omaha.  
Joyner, Quintard, Omaha.  
Kuhns, Barton, Omaha.  
Marshall, D. P. B., Omaha.  
Rose, W. B., Lincoln.  
Wilson, H. H., Lincoln.

#### Nevada

Pike, Milo N., Sparks.  
Scott, A. L., Pioche.

#### New Hampshire

Devine, Maurice F., Manchester.

#### New Jersey

Cohn, Edward, Elizabeth.  
Currier, Richard D., Newark.  
Eisenberg, Jerome, Newark.  
Green, David, Newark.  
Green, Harry, Newark.  
Harrison, J. Henry, Newark.  
Hartman, Rudolph, Newark.  
Hodges, Edward F., Camden.  
Jacoby, Norman S., Atlantic City.  
Losche, George F., Bogota.  
Satz, David M., Newark.  
Starr, Lewis, Camden.  
Wainright, Halsted H., Manasquan.  
Wise, Edward W., Red Bank.

#### New Mexico

Oldaker, Merritt W., Albuquerque.

#### New York

Bennett, Walter H., New York City.  
Berg, Alvin A., New York City.  
Brumley, Edward R., New York City.  
Callahan, R. H., New York City.  
Cribari, Wolfango E., Mt. Vernon.  
Donoghue, James W., New York City.  
Freeman, Harry J., New York City.  
Keleher, William T., New York City.  
Kiendl, Theodore, New York City.  
MacFall, R. C., New York City.  
Mack, William, Brooklyn.  
Mahon, William J., New York City.  
Meek, Edward M., New York City.  
O'Reilly, Thomas J., New York City.  
Pokart, S. Walter, New York City.  
Rosch, Joseph, Albany.  
Rose, Maurice, New York City.  
Rouse, E. Curtis, New York City.  
Russell, Charles T., New York City.  
Schlansky, Nathan, New York City.  
Shearn, Clarence J., New York City.  
Stevenson, W. E., New York City.  
Strong, Charles H., New York City.  
Tarbox, Russell Lord, New York City.  
Taylor, George H., Jr., Mt. Vernon.  
Tompkins, Leslie J., New York City.  
Tuthill, Paul E., New York City.  
Walker, Walter B., New York City.  
Wickser, Philip J., Buffalo.

#### North Carolina

Bradway, John S., Durham.  
Rouse, Robert H., Kinston.

#### North Dakota

Cuthbert, Frederic T., Devils Lake.  
Knauf, John, Jamestown.  
Lewis, John H., Minot.  
Young, C. L., Bismarck.

#### Ohio

Baker, Newton D., Cleveland.  
Chase, Evan M., Toledo.  
Durst, Robert D., Cincinnati.  
Eastman, Leroy E., Toledo.  
Finrock, C. M., Cleveland.  
Freeman, Hadley F., Cleveland.  
Friend, F. C., Cleveland.  
Heintzman, J. W., Cincinnati.  
Kerruish, S. Q., Cleveland.  
Kunkel, Frank H., Cincinnati.  
Lytle, Lawrence R., Cincinnati.  
Phares, Carl, Cincinnati.  
Schaefer, Carl W., Cleveland.  
Taylor, Herbert A., Cleveland.  
Thompson, J. Paul, Cleveland.  
Tyler, Julian H., Toledo.  
Vickery, Melville W., Cleveland.

#### Oklahoma

Beall, William O., Tulsa.  
Bird, J. W., Enid.  
Cheadle, John B., Norman.  
Harrison, A. O., Bartlesville.  
Lybrand, Walter A., Oklahoma City.  
McKeever, H. G., Enid.  
Richards, Alvin, Tulsa.  
Rigsby, A. W., Oklahoma City.

#### Oregon

Ralston, William C., Portland.

#### Pennsylvania

Ashton, Chester H., Knoxville.  
Bell, John C., Philadelphia.  
Bushong, Robert G., Reading.  
Comegys, Cornelius, Scranton.  
Dodds, Robert J., Pittsburgh.  
Driscoll, D. J., St. Mary's.  
Ervin, Spencer, Philadelphia.  
Fitzgerald, William J., Scranton.  
Galup, Fred D., Bradford.  
Gerner, Fred B., Allentown.  
Hart, George, Philadelphia.  
Hunter, Allen, White.  
Knight, Harry S., Sunbury.  
Leiser, Andrew A., Jr., Lewisburg.  
Leslie, Artemas C., Pittsburgh.  
Little, Charles B., Scranton.  
Littleton, Arthur, Philadelphia.  
McCarthy, Henry A., Philadelphia.  
McCouch, Eric A., Philadelphia.  
McCrary, R. A., Pittsburgh.  
Maene, George A., Philadelphia.  
Marsh, James I., Pittsburgh.  
Moorhead, Forest G., Beaver.  
Patton, J. Lee, Philadelphia.  
Pestcoe, Maxwell, Philadelphia.  
Rutter, William McK., Reading.  
Simpson, A. Carson, Philadelphia.  
Smith, Claude C., Philadelphia.  
Stevens, John B., Reading.  
Trimble, T. P., Jr., Pittsburgh.  
Von Moschzisker, Robert, Philadelphia.  
Weeks, J. Borton, Chester.  
Weil, A. Leo, Pittsburgh.  
Wright, Gifford R., Pittsburgh.

#### Rhode Island

Greenough, William B., Providence.  
Littlefield, James B., Providence.  
Remington, Charles C., Providence.  
Slade, George Paul, Providence.

#### South Carolina

Drummond, C. M., Spartanburg.  
Herbert, R. B., Columbia.

#### South Dakota

Caldwell, Clarence C., Sioux Falls.

#### Tennessee

Carpenter, William F., Nashville.  
Chambliss, A. W., Chattanooga.

#### Texas

Bering, Norman J., Houston.  
Kampmann, I. S., San Antonio.

Kennerly, Irl F., Houston.  
Liddell, Frank A., Houston.  
Longacre, Clarence, San Antonio.  
Lovett, H. Malcolm, Houston.  
Masterson, Carlos B., Angleton.  
Montgomery, H. F., Houston.  
Montgomery, J. T., Wichita Falls.  
Orgain, Will E., Beaumont.  
Powell, J. Y., Houston.  
Randolph, Ralph, Dallas.  
Reid, E. L., Orange.  
Smith, Asher R., Laredo.  
Storey, R. G., Dallas.  
Tarver, W. F., Houston.

#### Utah

Fraser, William A., Salt Lake City.  
Heppler, Sterling K., Richfield.  
Stewart, Samuel W., Salt Lake City.

#### Virginia

Plunkett, W. C., Norfolk.  
Talley, Robert H., Richmond.

#### Washington

Bogle, Lawrence, Seattle.  
Brown, Warren, Jr., Seattle.  
Desmond, Grover E., Seattle.  
Dumett, Ray, Seattle.  
Gates, Cassius E., Seattle.  
Ryan, John E., Sr., Seattle.

#### West Virginia

Jeffords, T. L., Harpers Ferry.  
Martin, Clarence E., Martinsburg.  
Meredith, James A., Fairmont.  
Ritz, Harold A., Charleston.

#### Wisconsin

Bell, Glen H., Madison.  
Braathen, Sverre O., Milwaukee.  
Hammersley, Charles E., Milwaukee.  
Stearns, Perry J., Milwaukee.  
Werner, Victor D., Milwaukee.

#### Wyoming

Griggs, Burt, Buffalo.  
McCollough, A. W., Laramie.



### A Little Jumping Goat Gave Its Name to **TAXICAB**

*Taxicab* is an abbreviation of *taximeter-cabriolet*—a vehicle carrying an instrument for automatically registering the fare. The name *cabriolet* is the diminutive of the French *cabriole*, meaning "a leap" like that of a goat, and was applied to this type of carriage because of its light, bounding motion. *Cabriolet* came from the Italian *capriola* meaning "a somersault," from Latin *capra* "a he-goat," *capra* "a she-goat." There are thousands of such stories about the origins of English words in

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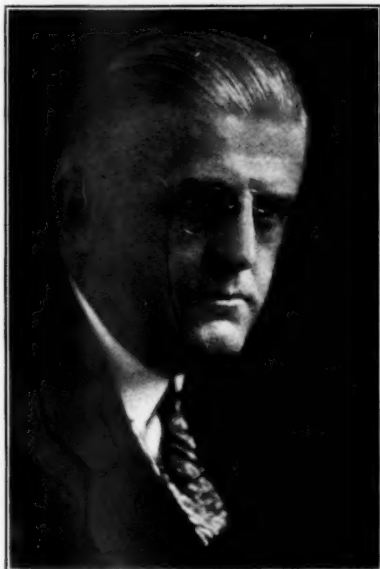


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# NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

## District of Columbia



FRANK J. HOGAN  
President Bar Association of The District  
of Columbia  
Harris & Ewing

### District of Columbia Bar Organizations Prepare for Annual Meeting of American Bar Association at Washington in October

In preparation for the reception and entertainment of our guests attending the 1932 annual meeting of the American Bar Association in Washington October 12-15 next, an elaborate and active committee organization is at work. As hosts the Bar Association of the District of Columbia has been joined by the Federal Bar Association, the Women's Bar Association, and the American Patent Law Association.

The Bar Association of the District of Columbia has a membership of one thousand including all of the active practitioners before the District courts and the Supreme Court of the United States with offices in Washington, as well as many officials of the Federal Government who are members of our profession.

The Federal Bar Association has a membership of some six hundred lawyers consisting of men and women holding official positions in the executive and judicial departments of the Federal Government at Washington and elsewhere. Mr. William R. Vallance, Assistant Legal Adviser of the Department of State, is President of this Association.

The American Patent Law Association is, as its name implies, the official organization of the patent bar. Mr. Thomas Ewing, former United States Commissioner of Patents, is its President.

The Women's Bar Association of the District of Columbia has a membership

of over two hundred, its President being Miss Pearl McCall, Assistant United States District Attorney.

Committees on Finance, Entertainment, Courtesies, Transportation, Publicity, Decorations and Souvenirs, Printing and Badges, Budget, Audit, Hotels and Halls, Hostesses, and for the entertainment of the Commissioners on Uniform State Laws, have all been appointed and are hard at work on the program for the annual meeting and for the meeting of the Commissioners on Uniform State Laws, which will be held in Washington the week prior to the gathering of the American Bar Association there.

All of these committees will report to a general committee of which the Chief Justice of the United States is honorary Chairman and the Attorney-General of the United States honorary Vice-Chairman. The active officers of this general committee are: Chairman, Frank J. Hogan, President, the Bar Association of the District of Columbia; Vice-Chairmen, William R. Vallance, President, the Federal Bar Association; Miss Pearl McCall, President, the Women's Bar Association; Thomas Ewing, President, American Patent Law Association; Secretary, George Maurice Morris. Every past President of the Bar Association of the District of Columbia during the past decade is serving either as chairman or as a member of one of the important committees.

It is contemplated that the entertainment program will include dinner parties at private homes, which were such a feature of Washington's entertainment of British and French lawyers who visited this country as guests of the American Bar Association in 1930, in addition to motor trips to such historically interesting places as Mount Vernon, The Naval Academy at Annapolis, and

the battlefields of Gettysburg and of nearby Virginia.

Of outstanding interest during the annual meeting will be the setting of the cornerstone in the magnificent United States Supreme Court Building now under construction on the Plaza of the Capitol.

Washington lawyers are looking forward with keen anticipation to the meeting of our national association in the capital city and they promise that for one week during 1932 there will be not a single reference to "depression."

The Bar Association of the District of Columbia, at a recent meeting, indorsed S. B. 3223, dealing with the unauthorized practice of law in the District, now pending in Congress, and appointed a committee to urge its passage at this session.

The following officers of the Association were elected at the annual meeting in January: Frank J. Hogan, President; Lucian H. Vandoren, First Vice-President; George E. McNeil, Second Vice-President; George C. Gertman, Secretary; William M. Millan, Treasurer.

The Directors of the Association are as follows: Samuel McComas Hawken, J. Miller Kenyon, Milton W. King, F. Regis Noel, Frederick Stohlman, Richard E. Wellford.

GEORGE C. GERTMAN, Secretary.

## Utah

### First Annual Meeting of Utah State Bar

The first Annual Meeting of the Utah State Bar was held at Salt Lake City on January 9, 1932. President Dean F. Brayton presided. The address of welcome was delivered by Judge E. A.

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Rogers, President of the Local Bar Association, who dwelt on the change in the situation brought about by the establishment of the State Bar and the opportunities of effective service presented to the new organization.

Secretary L. M. Cummings reported that since the formal organization of the Board of Commissioners of the Utah State Bar on June 30, 1931, the Board had held eight regular monthly meetings, at which they had adopted rules for admission to the Bar and also rules of conduct and discipline. He reported 711 members of the organization, and gave certain figures as to applications for admission and as to complaints filed.

Judge William M. McCrea then presented the report on "Admission to the Bar." Rules had been adopted by the Commission for the approval of the State Supreme Court. Perhaps one of the most important changes made was with reference to the time that an attorney coming from another jurisdiction must have spent at the Bar in order to secure admission in Utah. The requirement now is "that he shall have been not less than three years previously admitted to practice in the highest court of a State or territory or the District of Columbia, and have been actually engaged as a principal occupation for not less than three years within the ten years immediately preceding the filing of his application, either in the practice of law or in teaching law at an accredited law school or in service as a judge or justice of a court of record." He then called attention to the fact that the Rules had already been amended, with the approval of the Supreme Court, in reference to examinations and in other particulars.

Vice-President M. B. Pope then reported on the "Rules of Conduct and Discipline" and explained in detail the procedure provided for in such matters, after which Chairman A. B. Irvin presented the report of the Judicial Council. He instanced some of the important matters which have occupied Judicial Councils in other States. As for the Utah Judicial Council, it had devoted its time since organization to the three questions which had been assigned to it for investigation and report by the Board of Commissioners, viz.: mobilization of the judicial forces of the State; limiting practice before the Industrial Commission to licensed members of the Bar; and extending aid to the Supreme Court. He stated that the Council was now engaged in making a "survey of the judicial business in the State of Utah, and when we have completed that work we will be able to present a complete survey of the judicial business of every district in this State, with a trial record of every judge, which will show the number of cases filed, the character of the cases, whether they are civil or criminal, jury or non-jury. It will also show the number of probate and special proceedings, the number of trial days each judge has sat in trial of cases in his district, and such similar and related matters."

President Brayton then delivered his address, in which he told what the Commission had done during the past year. Mr. Mahlon E. Wilson then spoke of the Bill introduced by Senator Smoot providing for holding a session of the Tenth Circuit Court of Appeals at Salt Lake City, outlining its advantages and



WILLIAM M. MCCREA  
President, Utah State Bar  
Hollywood Studios, Salt Lake

calling on the Bar to support it. At the conclusion of his remarks, a resolution indorsing the measure was presented by Mr. Charles M. Morris and promptly adopted. Mr. Henry E. Beal then spoke briefly on "Rural Practice Reforms," and Mr. J. Wesley Horsley followed

with an address on "Suggested Probate Changes."

The Criminal Procedure Section held a meeting and adopted a resolution declaring that the State Bar favored a thorough study of the Code of Criminal Procedure prepared by the American Law Institute, the appointment of a committee of seven for that purpose, and instructing the committee, if it found it desirable, to prepare recommendations and amendments for submission at the earliest practicable date to the State Code Revision Committee and to the next session of the State Legislature. Other sections of the State Bar also had meetings.

At the afternoon session addresses were delivered on "Utah's New Tax Laws," by Mr. George A. Critchlow, and on "Code Revision" by Mr. George Y. Wallace. At the evening session the members listened to an address by Mr. Joseph J. Webb, first President of the California State Bar on "The Integrated Bar." Announcement was then made of the election of Mr. Samuel C. Powell as Vice-President of the State Bar. Mr. Powell had been previously elected member of the Board for a three-year term from the Second Division. It was also announced that the election in the Third Division had resulted in a tie vote between Mr. Gibson and Mr. Tingey; that Mr. Tingey had withdrawn his name and that the Commission had declared Mr. George J. Gibson member from that Division for a three-year term. The Commission had also reappointed Mr. L. M. Cummings as Secretary. At the conclusion of these announcements, Retiring President Brayton turned the gavel over to Judge William M. McCrea, the President for 1932.

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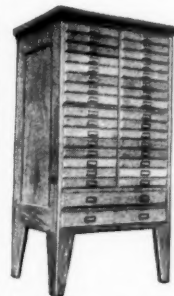
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